(6)

PROCEEDINGS AND ORDERS DATE: 102285

CASE NBR 85-1-05116 CSY CASE STATUS: DECIDED
SHORT TITLE Lucas, Richard P. DOCKETED: Jul 18 1985
VERSUS New York

Entry	Date	Note	Proceedings and Orders
1	Jun 8 1985		Application for extension of time to file petition and order granting same until July 22, 1985 (Marshall, June 11, 1985).
2	Jul 18 1985	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jul 26 1985		Brief of respondent New York in opposition filed.
5	Aug 1 1985		DISTRIBUTED. September 30, 1985
6	Aug 3 1985	X	Reply brief of petitioner Richard P. Lucas filed.
7	Aug 20 1985	X	Supplemental brief of petitioner Richard P. Lucas filed.
9	Oct 7 1985		REDISTRIBUTED. October 11, 1985
11	Oct 15 1985		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECEIVED
JUL 23 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

85-5116

In The

Supreme Court of the United States

October Term, 1985

Richard P. Lucas,

Petitioner,

-against-

The People of the State of New York

Respondents.

Petition for a Writ of Certiorari to the Appellate Division of The Supreme Court of the State of New York, Third Judicial Department.

Ricahrd P. Lucas, 78-A-2362
Petitioner Pro Se
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

TABLE OF CONTENTS

Questions Presented for Review..... i

Cases Cited..... iii

Statutes Involved..... v

Petition..... 1

Opinions Below..... 1

Jurisdiction..... 2

Statement of the Case..... 2

Stage at Which Issues Raised..... 7

The Reasons for Granting Writ..... 8

1. This case presents the question of whether an inculpatory statement obtained in violation of the Sixth Amendment Right to Counsel can be used to impeach a defendant who takes the witness stand. The New York Court of Appeals said yes in People v. Ricco, 56 N.Y. 2d 320 (1982). The United States Court of Appeals for the Second Circut said no in United States v. Brown, 699 F. 2d 585.

2. The Appellate Division upheld the introduction of petitioner's involuntary, inculpatory statement for impeachment purposes, in violation of the rule enunciated in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed. 2d 290.

3. This Court should review the decision below to decide whether it is a violation of the right to a fair trial and due process of law for a trial court and prosecutor to knowingly allow a police officer to testify perjuriously that petitioner admitted he was at the scene of the crime when it was committed, when that is the decisive issue in the case.

4. This Court should review the decision below to decide whether the police may seize an object not particularly named or described in a search warrant, and which provides no objective, readily apparent nexus to the crime, on the basis of a "reasonable inference" that the object is evidence.

5. The decision below gives this Court the opportunity to clarify whether United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, allows the police to make multiple searches, days apart, pursuant to a single search warrant, on a stationary vehicle legally parked in a public garage, whose owner is in police custody miles away, in another state.

6. The decision below gives this Court the opportunity to decide whether the inclusion in a search warrant of the statement "other evidence of a homicide use in connection with the crime of murder," when describing what the police may seize, is consistent with the principles articulated by this Court in Anderson v. Maryland, 427 U.S. 463, or whether they contravene a long line of decisions by this Court which hold that a search warrant must particularly describe the place to be searched and the items to be seized.

7. This Court should review the decision below to decide whether a sentencing court must take rehabilitation of the offender into consideration when the State's Penal Law mandates that it be considered.

8. This Case gives this Court the opportunity to decide whether comments of the prosecutors during summation were so unfair as to deprive petitioner of a fair trial and due process of law.

9. This Court should review the decision below because the Appellate Division has upheld the introduction at petitioner's trial of prejudicial evidence not connected to the crime, thereby depriving petitioner of a fair trial and due process.

10. This Court should review the decision below because the lower courts have failed to comply with the mandates of this Court that guilt must be proven beyond a reasonable doubt.

11. This Court should review the decision below to decide whether it is Double Jeopardy to retry petitioner for the crime of Felony Murder committed in the course of a Kidnapping, when the kidnapping had been dismissed on appeal because of a finding that no kidnapping occurred, and a finding that it merged with and was inseperable from the crime of Robbery.

Conclusion..... 28

Appendix A - Second Lucas Decision of the Appellate Division

Appendix B - First Lucas Decision of the Appellate Division

Appendix C - Decision of New York Court of Appeal on Lucas First Appeal

Appendix D - Decision and Rulings of the Sullivan County Court

Appendix E - Order of the Appellate Division on Second Lucas Appeal

Appendix F - Certificate of the Chief Judge of the State of New York denying leave to appeal to the New York Court of Appeals.

Appendix G - Third Graham decision of the Appellate Division

Appendix H - First Graham decision of the Appellate Division

Appendix I - Lucas Omnibus Motion in Sullivan County Court.

Appendix J - Lucas Sentencing Minutes

Appendix K - Items seized in search of Lincoln automobile at Gateway Downtowner Hotel, Newark, New Jersey, October 17, 1975

Appendix L - Excerpts from petitioner's Brief on Appeal to the Appellate Division, Third Department

QUESTIONS PRESENTED FOR REVIEW

1. Where an inculpatory statement was obtained after defendant has been assigned counsel in a extradition proceeding in violation of the Sixth Amendment Right to Counsel, may it be used to impeach a defendant if he takes the witness stand and testifies in his own behalf?

2. Where an appeals court rules that an inculpatory statement is involuntary and not spontaneous because it was wrongfully induced by statements of a police officer, may it be used to impeach a defendant if he takes the witness stand and testifies in his own behalf?

3. Where a police officer commits perjury at petitioner's trial, and testifies that petitioner admitted to being at the scene of the crime when it was committed, does it violate the right to a fair trial and due process of law for the trial judge and prosecutor, who are aware of the falsity of such testimony, to allow a conviction to result therefrom?

4. May the police seize objects not particularly named or described in a search warrant, and which provide no objective, readily apparent nexus to the crime, on the basis of a "reasonable inference" that the objects are evidence?

5. Does United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, give the police authority to make multiple searches, days apart and pursuant to a single search warrant, on a stationary vehicle, legally parked in a public garage, whose owner is in police custody, miles away from the scene?

6. Where a judge issues a search warrant and includes the statement that the police may search for "other evidence of a homicide use in connection with the crime of murder," without even specifying a particular homicide, is it an illegal, general warrant because it allows the police unlimited discretion and permits them to substitute their judgment for that of a magistrate when deciding what may be seized?

7. Where the State's Penal and case law mandate that rehabilitation be considered when imposing sentence on a

convicted offender, does it violate due process and equal protection of the law for the sentencing judge to refuse to consider petitioner's rehabilitative potential?

8. Does it violate the right to a fair trial and due process of law for the prosecutor to make numerous, highly prejudicial remarks in his summation, which include repeated characterizing petitioner as a "liar"?

9. Where there is no evidence or testimony to connect a shotgun and piece of rope of petitioner to the crime, is it a violation of the right to a fair trial and due process of law to allow said items to be admitted as evidence at petitioner's trial allowing the inference that somehow they were used in the crime.

10. Is it a violation of due process of law for petitioner to be convicted of felony murder on less than proof of guilt beyond a reasonable doubt, and is it also a violation of due process of law for petitioner to be convicted of Intentional Murder when the evidence as a whole, and taken in a light most favorable to the prosecution, fails to show that petitioner had or shared the intent to commit murder?

11. After a conviction for kidnapping has been dismissed on appeal due to a finding both that no kidnapping occurred because if there were a kidnapping it would have been incidental to, inseperable from and therefore, merged with the crime of Robbery, does it subject petitioner to Double Jeopardy to be retried for Felony Murder using the dismissed kidnapping as the underlying felony?

CASES CITED

Andresen v. Maryland,
427 U.S. 463.....21, 22

Berger v. United States,
295 U.S. 78.....28

Blackburn v. Alabama,
361 U.S. 199.....14

Cady v. Dombrowski,
413 U.S. 433.....20

Carroll v. United States,
267 U.S. 132.....20

Chimel v. California,
395 U.S. 752.....18

Coolidge v. New Hampshire,
403 U.S. 443.....18, 20

Harris v. New York,
401 U.S. 222.....12

Jackson v. Virginia,
443 U.S. 307.....32

Jacobellis v. Ohio,
378 U.S. 184.....32

Lo Ji Sales, Inc. v. New York,
422 U.S. 319.....18, 22

Mincey v. Arizona,
437 U.S. 385.....13, 14

People v. Batten,
40 A.D.2d 549, affd. 31 N.Y.2d 737.....31

People v. Burgh,
89 A.D.2d 672.....33

People v. Farrar,
52 N.Y.2d 302.....33

People v. Graham,
69 A.D.2d 544.....22

People v. Lucas,
53 N.Y.2d 678.....12, 13, 15

People v. Ricco,
56 N.Y.2d 320.....12, 13

Portash v. New Jersey,
440 U.S. 450.....12

South Dakota v. Opperman,
428 U.S. 364.....20

United States v. Brown,
699 F.2d 585.....12, 13

United States v. Fernandez,
480 F.2d 726.....26

United States v. McManaman,
606 F.2d 919.....13

United States v. Mohabir,
624 F.2d 1140.....13

United States v. Ross,
456 U.S. 798, 102 S.Ct. 2157.....19, 20

In Re Winship,
397 U.S. 358.....32

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV:

> The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law,....

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.....and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Constitution, Article 1, Section 6:

> No person shall be held to answer for a capital or otherwise infamous crime....unless on indictment of a grand jury....In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself....No person shall be deprived of life, liberty or property without due process of law.

New York Constitution, Article 1, Section 12:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.....

New York Penal Law, Section 20.00:

> When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

New York Penal Law, Section 20.10:

> Notwithstanding the provisions of sections 20.00 and 20.05, a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

New York Penal Law, Section 125.25, Subdivision 3:

> Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the seconddegree, and , in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:
>
> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and
>
> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

New York Penal Law, Section 135.25, Subdivision 2;

> He restrains the person abducted for a period of more that twelve hours with intent to:
>
> (a) Inflict physical injury upon him or violate or abuse him sexually; or
>
> (b) Accomplish or advance the commission of a felony; or
>
> (c) Terrorize him or a third person; or
>
> (d) Interfere with the performance of a governmental or political function

New York Criminal Procedure Law, Section 690.05, Subdivision 2:

> A search warrant is a court order and process directing a police officer or a peace officer appointed by the state university to conduct a search of designated premises, or of a designated vehicle, or of a designated person, for the purpose of seizing designated property or kinds of property, and to deliver any property so obtained to the court which issued the warrant.

No.

In The

Supreme Court of the United States

October Term, 1985

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department.

The petitioner, Richard P. Lucas, prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, dated and entered on November 7, 1984, which became the final decision of the highest Court of the state by virtue of denial of leave to appeal to the Court of Appeals of the State of New York, rendered on April 23, 1985, by the Honorable Sol wachtler, Chief Judge of the State of New York. Review is sought of the order of the Appellate Division affirming the judgment of conviction for Intentional Murder 2d Degree (Penal Law §125.25 (1)) and Felony Murder 2d (Penal Law §125.25(3)).

OPINIONS BELOW

The second opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (Appendix A) is reported at 105 A.D.2d 545, 481 N.Y.S.2d 789. The first opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (Appendix B) is reported at 73 A.D.2d 699, 422 N.Y.S.2d 534. The opinion of the New York Court of Appeals on petitioner's first appeal (Appendix C) is reported at 53 N.Y.2d 678, 439 N.Y.S.2d 99. The opinion of the Sullivan County Court denying the suppression motions of the petitioner and Richard B. Graham, the motions having been heard together, Appendix D) is reported at 90

Misc. 2d 1019, 396 N.Y.S.2d 966. The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department on the Graham third appeal (Appendix G) is reported at 90 A.D.2d 198, 457 N.Y.S.2d 962. The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department on the Graham First appeal (Appendix H) is reported at 69 A.D.2d 544, 419 N.Y.S.2d 290.

JURISDICTION

The Order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, was dated and entered on November, 7, 1984. A copy of the order is attached hereto as Appendix E.

Leave to Appeal to the Court of Appeals of the State of New York was denied by Certificate of the Honorable Sol Wachtler, Chief Judge of the State of New York, dated April 23, 1985. A copy of the certificate is attached hereto as Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE

This petition is made as a result of a conviction and sentence for two counts of the crime of Murder in the Second Degree, Intentional and Felony Murder.

Craig Mitton, a courier for a Newburgh, New York oil company, was last seen alive at his company's office in Newburgh on October 13, 1975 at approximately 4:30 p.m. (T-30-33). His body was found at a remote bungalow colony in Sullivan County, New York on October 15, 1975 (T-133-134). The county coroner found that he had been shot and had died as a result (T-271).

Mitton had collected monies from company gas stations and prepared them for deposit; the total amount being slightly in excess of $25,000 (T-24). That money was never deposited (T-48).

Mitton's wife had reported him missing on the night of October 13, 1975 and the State Police were called in.

Investigation revealed that a witness, Gloria Baker, had seen petitioner in his car near the bank where Mitton was expected to make

his deposit, at approximately 3:50 p.m., on October 13, 1975. Someone was in the car with petitioner, but Baker could not identify that person (T-79,84).

Other investigation revealed that Richard Graham had the same job as Mitton immediately prior, but had been fired for making a late deposit and because he was suspected of having taken some petty cash (T-46). It was further found that Graham and petitioner were friends, and that they and two women friends had left the Walden, New York area (where they resided) on October 13, 1975.

Baker also claimed that petitioner had called her on October 5, 1975 and asked for her keys so he could burglarize a gas station she managed for the same company that Mitton also worked for, and she refused (T-92). She claims that a burglary did occur on the night of the phone call, and that cigarettes and some small change were taken (S-210). No crimes were ever charged and no arrest ever made on this burglary, and there was no evidence that it was ever reported to the police prior to the interview of Baker after Mitton was found missing. Baker also claimed that petitioner told her on the phone not to tell anyone of their conversation or "someone could get hurt." (T-92-94).

Mitton was supposed to make the deposit at the bank using a company car. That car was found at the end of a remote road on October 14, 1975, miles from the bank where the prosecution claims Mitton was abducted and miles from the place where Mitton's body was found.

On October 17, 1975, members of the New York State Police Bureau of Criminal Investigation (hereinafter BCI) went to Newark, New Jersey where they located petitioner's Lincoln automobile which was legally parked in an attended public parking garage below the Downtowner Motor Hotel. Later in the day of October 17, 1975, two BCI officers appeared before a local magistrate, a Judge Scalera, and advised him orally of facts which they believed spelled out probable cause to search petitioner's car (T-612). A search warrant was issued which authorized the police to search the auto for a .25 caliber automatic, fingerprints, palmprints, bloodstains, and <u>other evidence of a</u>

<u>homicide used in connection with the crime of murder.</u> (Emphasis supplied).

The BCI officers then went to petitioner's car, and along with other officers conducted an exhaustive search of the vehicle which included vacuum sweepings and dusting for fingerprints. The police seized over 500 items from the vehicle (Appendix K), none of which were among the items particularly described in the search warrant, and none of which provided an objective, readily apparent nexus to the crime.

In order to facilitate the search, the police had obtained the key to the car from the garage attendant. After the search was completed, the car was revoked and the key was returned to the attendant. The car was not seized on October 17, 1975, and instead was left in its parking slot in the garage and was kept under discreet surveillance by BCI officers (T-1245).

On October 19, 1985, BCI officers who had traveled to Ft. Lauderdale, Florida, arrested petitioner, Richard Graham, and their two female companions (T-1245). No arrest warrant was ever sought from our issued out of a Florida Court, and the first filing of charges in New York and the first issuance of an arrest warrant in New York was on October 20, 1975, the day after the arrests (R-100). That arrest was subsequently found to be illegal (<u>People v. Graham,</u> 90 A.D.2d 198, 457 N.Y.S.2d 962 (1982), Appendix G).

A confession was obtained from defendant Graham, and on October 20, 1975, a BCI officer returned to petitioner's vehicle which was still parked at the Downtowner Motel Hotel, and without obtaining a new search warrant, dusted the interior of the trunk lid and found fingerprints (T-636-637).

On October 21, 1975, petitioner was flown to New Jersey by BCI officers Reidy, Bebenzi and Venezia. During the flight petitioner is alleged to have made an ambiguous admission to Reidy in substance that he might have been involved, but he didn't do everything (H-1251, 1255-6). That admission had been suppressed by the New York COurt of Appeals pursuant to petitioner's first appeal, because the COurt found

that it had been obtained in violation of petitioner's Sixth Amendment Right to Counsel. The Court also found that the admission was involuntary and not spontaneous, because it was induced by statements made by BCI officer Reidy (People v. Lucas, 53 N.Y.2d 678, Appendix C).

Despite the suppression of the admission, Reidy was allowed to testify about it in order to impeach petitioner when he took the witness stand at his second trial (T-1166). However, Reidy even went further, contrary to his sworn testimony on four former occasions, for the first time he claimed that petitioner had said that he was there but didn't do everything. Since there was no evidence in the case that petitioner was present when the victim was shot, such perjury was extremely damaging.

Finally, on October 22, 1975, after the seizure of petitioner's car, and the arrest, extradition and arraignment of petitioner, BCI officers Graham and Hulik finally claimed to have matched the prints found on the trunk lid with those of Mitton (T-804-5). This alleged fingerprint match, five days after the first search of the vehicle, and five days after the People claim the vehicle was seized by the police, provided the first objective evidence liking the vehicle to the crime.

Also, on October 20, 1975, after the search of petitioner's and Graham's motel rooms in Florida had revealed receipts for safety deposit boxes and travelers checks from Newark, New Jersey banks, the police returned to Judge Scalera in Newark and obtained search warrants for the search and seizure of the monies and records in those banks. The search of the motel rooms in Florida was also found illegal and the fruits thereof ordered suppressed (People v. Lucas, 53 N.Y.2d 678, Appendix C).

From the women friends of petitioner and Graham came additional information. Graham's friend Roberta Holmes indicated that she had found a gun in her closet on the morning of October 13, 1975 (T-359), and that Graham came in at noon and took the gun (T-361). She claimed that Graham left with petitioner at noon (T-362), although on direct

and cross-examination it is shown that at various times she had testified a). That she had neither heard nor seen petitioner but had seen Graham get into petitioner's car (T-363, 412) and b). She had heard and seen nothing because she had been half asleep (T-410).

Holmes and Cheryl Kilb, petitioner's girlfriend, testified to Graham and petitioner coming into Kilb's house on October 13, 1975 at 8:00 p.m. together with bags, and having left to go on vacation without the destination being known (T-368).

No palm prints were found on the inside trunk lid of petitioner's car although fingerprints identified as Mitton's were found (T-835). It is reasonable to assume that a person pushing on a locked trunk lid from the inside would use his palms more than his fingers.

Evidence from the killing of Mitton indicates that it was done by only one person, which appears from the fact that the victim was dragged by the heels from the place where shot to the place where found (T-596). Reasonably, if there had been two people, they would have taken Mitton's arms and legs and lifted him to a more remote place.

Petitioner testifed at his second trial (T-886-1049, 1120). Petitioner stated that Graham told him that there was to be a big drug deal and that four other people were involved. Graham asked petitioner for the use of his car. On October 13, 1975, they drove to Middletown, New York, where Graham made some phone calls and they wasted some time. Graham said he was meeting one of the others (Vito) and left petitioner at the bar, using petitioner's car (T-909-912). Graham waved down an approaching vehicle which was being driven by Mitton. Petitioner went over to the Mitton vehicle while Graham and Mitton (with briefcase) walked by to petitioner's vehicle. Graham told petitioner to use Mitton's car while they were using his. Petitioner did not look back and therefore does not know what Graham and Mitton did after he passed them. He saw no weapon (T-917-920).

Petitioner then went to Shelton, Connecticut where he expected to meet with a family member. The family member could not be located, after looking for a half hour, so petitioner returned to Walden, New

York (T-920-922) where he met Graham, who indicated that the other man was not coming back and that the Mitton vehicle would have to be disposed of.

Graham drove the Mitton vehicle to a remote road ending, with petitioner following in his Lincoln. The vehicle was left and petitioner noticed briefcases in the Lincoln, questioned Graham about them and learned of Graham's plans for the money and leaving for Florida (T-922-930).

Petitioner also explained why part of the monies were deposited in a bank in his name (T-929-930).

Petitioner was a truck driver and earned over $20,000 in the year prior to his arrest (T-889).

Some of petitioner's testimony was confirmed circumstantially. Prosecution witness Holmes testified that Graham made a toast "here's to Vito" in the lounge of the Downtowner Motor Hotel (T-403). This was one of the men petitioner had described (T-905, 910, 922).

Prosecution witness Holmes also testified that Graham had discussed drugs with her (T-405, 406-407, 409). Holmes was Graham's girlfriend.

Petitioner's description of what occurred was more logical and more compelling than the People's theory.

STATE AT WHICH ISSUES RAISED

The issue of the unconstitutionality of the search and seizure of petitioner's automobile was first raised on Petitioner's motion in leave in the trial Court, to suppress the evidence sized in the searches, together with the fruits thereof. This issue was resolved against petitioner in the decision of the Sullivan County Court (Appendix D).

All other issues were first raised at trial and resolved against petitioner by the Sullivan County Court on the record, Appendix D.

The issued were again raised in petitioner's brief on appeal to the Appellate Division. The Appellate Division held that, "although our discussion herein does not deal at length with all of the issues, we have considered each and every error asserted by defendant and find

that none of them, either individually or collectively, require reversal:

1. The Appellate Division did not specifically address the question of whether it violated petitioner's constitutional rights to introduce, for impeachment purposes, the inculpatory statement obtained in violation of his Sixth Amendment Right to Counsel (Appendix A).
2. The Appellate Division did not specifically address the question of whether it violated petitioner's constitutional rights to introduce, for impeachment purposes, his inculpatory, involuntary statement (Appendix A) in violation of Mincey v. Arizona 437 U.S. 385.
3. The Appellate Division did not specifically address the question of whether it violated petitioner's constitutional rights for the trial Court and prosecutor to knowingly allow a police officer to testify perjuriously that petitioner admitted he was at the scene of the crime (Appendix A).
4. The Appellate Division did not specifically address the question of whether the police may seize an object not particularly named or described in a search warrant on the basis of a "reasonable inference" that the object is evidence, or is probable cause that an object is evidence still the necessary predicate for its seizure (Appendix A).
5. United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157 allows the police to make multiple searches days apart and pursuant to a single search warrant, on a stationary vehicle legally parked in a public garage, whose owner is in police custody miles away from the area (Appendix A).
6. The inclusion of the statement "other evidence of a homicide used in connection with the crime of murder" in the search warrant authorizing a search of petitioner's vehicle, did not make it a general warrant because it limited the search to a particular type of crime (Appendix A).
7. It was not Double Jeopardy to retry petitioner for Felony Murder committed in the course of a Kidnapping when the kidnapping has been dismissed on appeal because of a finding that no kidnapping occurred and because it was incidental to and inseparable from the crime of Robbery and the Court had not made "a determination going to factual innocence", and that "even a determination of factual innocence will not bar a retrial of the felony murder count".
8. In the prosecutor's summation, while the prosecutor may have occasionally stayed beyond the bounds of proper advocacy, was not so prejudicial as to deny petitioner a fair trial (Appendix A).
9. The Appellate Division did not specifically address the question of whether the introduction at trial of evidence not connected to the crime denied petitioner a fair trial (Appendix A).
10. Petitioner's guilt was proven beyond a reasonable doubt (Appendix A) and that a reiteration by the trial judge of his original charge on reasonable doubt was sufficient to satisfy the jury's post-change request for a clarification of that change.
11. The trial Court considered rehabilitation when sentencing petitioner and rejected it as a basis for fixing sentence in the circumstances of this case. (Appendix A).

THE REASONS FOR GRANTING THE WRIT

1. This case presents the question of whether an inculpatory statement obtained in violation of the Sixth Amendment Right to Counsel can be used to impeach a defendant who takes the witness stand. The New York Court of Appeals said yes in People v. Ricco, 56 N.Y.2d 320 (1982). The United States Court of Appeals for the Second Circuit said no in United States v. Brown, 699 F.2d 585.

According to BCI officer Reidy, petitioner made an admission on the airplane while being transported from Florida to New York. This admission was suppressed on appeal from the first conviction of the petitioner (People v. Lucas, 53 N.Y.2d 678, Appendix A), because petitioner was in custody and the "indelible right to counsel had attached."

However, after petitioner testified at his second trial, the trial Court ruled that Reidy could testify in rebuttal as to that admission on the authority of this Court's decision in Harris v. New York, 401 U.S. 222. The petitioner objected (T-1166).

The Appellate Division did not specifically address this issue in petitioner's appeal, but in People v. Ricco, 56 N.Y.2d 320, the New York Court of Appeals has held that a statement obtained in violation o the Sixth Amendment Right to Counsel may be used to impeach a testifying defendant.

In United States v. Brown, 699 F.2d 585, the Second Circuit Court of Appeals held that the right to impeach does not lie by using a statement that has been obtained in violation of a defendant's Sixth Amendment Right to Counsel. That determination was based on this Court's decision in Portash v. New Jersey, 440 U.S. 450.

The fact that the defendant in Brown, supra, was already indicted at the time the statement was obtained was not the deciding factor for the Court's decision. The Court disallowed the defendant's statement because it was obtained after defendant's Sixth Amendment Right to Counsel had attached, and waivers of such rights "must be measured by a "higher standard" than are waivers of Fifth Amendment Rights." United States v. Mohabir, 624 F.2d 1140 at 1146 (2d Cir. 1980).

It is clear that a conflict exists between the holding of the New York Court of Appeals in Ricco, supra, and the holding of the Second Circuit in Brown, supra. The United States Court of appeals for the Tenth Circuit has also held in United States v. McManaman, 606 F.2d 919 (10th Cir. 1979), that a statement obtained in violation of the Sixth Amendment Right to Counsel may be used to impeach a testifying defendant.

The conflict between the New York Court of Appeals and the Second Circuit, and between the Second Circuit and the Tenth Circuit, calls for the intervention of this Court not only on petitioner's behalf but also on behalf of other similarly situated defendants.

2. This Court should review the decision below because the Appellate Division upheld the introduction for impeachment purpose, of petitioner's involuntary, inculpatory statement in violation of the rule enunciated by the Court in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed.2d 290.

In the decision on petitioners first appeal (Appendix C), in addition to finding that the inculpatory statement was obtained in violation of petitioner's Sixth Amendment Right to Counsel, the New York Court of Appeals also reversed the Appellate Division decision that the alleged statement was voluntary and spontaneous, and found that such conclusion was not supported by the record. (Appendix C).

The Court of Appeals stated:

> "Here, there can be no doubt that the police officer, by engaging in the discussion with defendant concerning the crime with which he was charged and informing defendant of an alleged accomplice's statement, evoked the uncounseled, inculpatory statement from the defendant." People v. Lucas, 53 N.Y.2d 678.

The Court of Appeals made a finding that petitioner's statement was psychologically coerced, so that the use of such statement for impeachment purposes, even under Fifth Amendment principles, is impermissable. The fact that the Court of Appeals suppressed for other reasons does not dilute their finding that the statement was involuntary and the result of psychological coercion.

As this Court held in Blackburn v. Alabama, 361 U.S. 199 at 206, 80 S. Ct. 274 at 279, "...coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition."

This Court held in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed.2d 290, that statements that are involuntary and coerced, in any manner, cannot be used in any way against a defendant at his trial. Despite that pronouncement by this Court, it is apparent that the New York Courts do not understand or refuse to follow that dictate, and this Court should grant certiorari in this case because it will provide the opportunity to make it clear to New York and other jurisdictions that the interpretations and prouncements of the law by this Court, must be followed.

3. This Court should review the decision below to decide whether it is a violation of the right to a fair trial and due process of law for a trial Court and prosecutor to knowingly allow a police officer to testify perjuriously that petitioner admitted he was at the scene of the crime when it was committed, when that is the decisive issue in the case.

An important issue at petitioner's trial was whether he was present at the scene of the crime where the victim was killed.

BCI officer Reidy claimed that petitioner had made an admission to him on the plane while being returned from Florida to New York. That is the admission that was suppressed on appeal by the New York Court of Appeals (Appendix C).

That alleged admission was even quoted by the Court of Appeals:

> "Well, I would like to talk to somebody about this. I might have been involved, but I didn't do - I didn't kill anybody." (People v. Lucas, 53 N.Y.2d 678 at 680.)

At the suppression hearings Reidy gave a slightly different version, but consistent with what he had said at the Grand Jury, that petitioner said:

> "I might have been involved, but I didn't do everything." (SH-619-20, 627-28).

At the second trial during direct testimony for the first time Reidy testified (T-1249):

> "...if he could talk to the District Attorney, that he could show him that maybe he was there but he didn't do everything...." (Emphasis supplied).

Reidy had never before claimed that petitioner said he was at the place where the killing took place.

Reidy's investigative notes, supposedly written down within minutes after petitioner made the alleged admission on the plane, indicated that petitioner said:

> "I might have been involved, but I didn't do everything." (T1259).

Reidy's testimony at the Grand Jury was:

> "...well, if I could talk to him, meaning the District Attorney, I can show I didn't do everything." (T-1251).

The People, during the second trial, conceded that on the previous trial Reidy had never said that Petitioner admitted to being "there." (T-1256). The trial judge stated that there was no testimony that petitioner had admitted being "there." (T-1255).

Not only did Reidy state during direct testimony that petitioner had said he "was there" but, given the chance to change his testimony, he stuck to his perjurious statement (T-1251). Reidy continued to insist on his perjurious testimony even after reading his Grand Jury testimony (T-1254).

Although Reidy finally admitted that his investigative notes did not indicate that petitioner had admitted to being there (T-1259, 1260), he never retracted his prior testimony.

Whether petitioner was at the scene of the murder or not was the decisive issue of the case. The trial judge and the prosecutor both knew that Reidy was testifying perjuriously, but refused to strike his testimony and allowed petitioner's conviction to result therefrom.

The prosecutor's subornation of Reidy's perjury at trial, was further compounded when he cited that perjured testimony as fact in his brief on appeal to the Appellate Division. This tactic by the prosecutor was highly unethical, and deprived the petitioner of a fair trial and a fair appeal in violation of the Due Process clause of the 14th Amendment to the United States Constitution.

The prosecutor's behavior was totally improper and calls for the strongest possible sanctions by this Court, to send a message to the Courts of New york and other jurisdictions, that this type of misconduct will not be tolerated.

4. This Court should review the decision below to decide whether the police may seize an object not particularly named or described in a search warrant, and which provides no objective, readily apparent nexus to the crime, on the basis of a "reasonable inference" that the object is evidence.

Petitioner's Lincoln automobile was located by BCI officers at an attended garage in the Downtowner Motor Hotel, Newark, New Jersey, in the early morning hours of October 17, 1975. Later that day a search warrant to search the auto was obtained from the Honorable Nicholas Scalera, Judge of the Superior Court of Essex County, New Jersey.

The search warrant authorized the police to enter into petitioner's automobile and there diligently search for:

> "....25 cal. automatic pistol, fingerprints and palmprints, bloodstains, and other evidence of a homicide used in connection with the crime of murder...."(Emphasis supplied).

The search warrant did not authorize the seizure of the automobile itself. During the initial search on October 17, 1975, the police seized over 500 objects from the vehicle and without authorization, removed them to the State of New York (SH-32-41, T-626-27, Appendix K). None of the items had any evidentiary value and consisted of objects as wide ranging as a "Tom and Betty" coloring book, to a single raisin found on the floor of the vehicle (Appendix K).

Among the items searched for and seized, were vacuum sweepings from inside the car and truck (SH-55-57). The search had been started at 8:00 p.m. after BCI officer Graham go the key from BCI officer Curtis who had obtained it from the garage attendant (SH-94, 122-124). The car had been locked (SH-139), and had been under surveillance but not seized by New York State Police (SH-139).

Officer Graham testified on petitioner's first trial, that after the search of October 17, 1975 was completed, the car was relocked and the key was returned to the garage attendant.

After the search, surveillance was maintained on the vehicle which was left in its original parking slot (T-617).

On October 19, 1975, petitioner and co-defendant Graham were arrested in Florida, and allegedly based on information obtained from a confession made by co-defendant Graham, BCI Officer Graham returned to petitioner's automobile at the downtowner Motor Hotel garage on October 20, 1975, and without obtaining a new search warrant, entered into the automobile and further dusted for prints (T-636). He claims not to have dusted the interior of the trunk lid previously although he had dusted other areas of the car on the first occasion. (T-637, 721). He first found the prints on the interior of the trunk lid on October 20, 1975 (T-638). The return on the warrant filed in New Jersey by Joseph P. Lordi, prosecutor of Essex County, New Jersey states that the warrant was executed on October 17, 1975 (R-104).

The People successfully argued in the Courts below that petitioner's automobile was seized pursuant to the first search on October 17, 1975, because the police could "reasonably infer" that the vehicle was evidence in the crime.

The Petitioner argued that the vehicle was not seized on October 17, 1975, but that if it was, it was an illegal seizure because the police did not have probable cause to believe the the car was evidence in the crime. The prints that were found on the 20th, and not identified until the 22nd, could not provide probable cause to seize the vehicle on the 17th. The was no other evidence to associate the vehicle with the crime.

The Fourth Amendment to the United States Constitution prohibits general searches and warrants issued on less than probable cause.

Where police have gone beyond the four corners of a warrant, those additional items searched or seized must be suppressed.

It is acknowledged that there is a plain view exception and that mere evidence may be seized (Chimel v. California, 395 U.S. 752, 763; Coolidge v. New Hampshire, 403 U.S. 443), but there has never permitted the seizure of objects not named in the warrant on the basis that it might turn out to be evidence, or as the People argued below, on a "reasonable inference" that an object is evidence.

Lo Ji Sales, Inc. v. New York 422 U.S. 319, clarified many principles with regard to a search warrant. Applicable here is the principle that not only must there be probable cause to search for property, but there must be probable cause to seize the particular item. (Emphasis supplied). There was no probable cause to seize petitioner's automobile, either on the basis of information supplied to the judge before he issued the warrant, or by reason of the search conducted on October 17, 1975.

The Appellate Division has attempted to create a new standard as a predicate for the search and/or seizure of an object by upholding the seizure of petitioner's automobile on the basis of a "reasonable inference" that it was evidence of a crime, and this Court should take this opportunity to make clear to New York State and other jurisdictions, that probable cause is the necessary predicate for searches and seizures.

5. The decision below gives this Court the opportunity to clarify whether United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, allows the police to make multiple searches, days apart, pursuant to a single search warrant, on a stationary

vehicle legally parked in a public garage, whose owner is in police custody miles away.

One of Petitioner's arguments in the New York COurts in regard to the search of his automobile, was that the police made a warrantless, illegal second search of the vehicle on October 20, 1975, after having exhausted their authority under the warrant upon the completion of the first search on October 17, 1975, and by their relinquishment of control over the vehicle when they returned the key to the parking attendant.

The Appellate Division held that the vehicle had been seized pursuant to the first search (See Point 4, supra), and also stated that "... even if we were to hold that the police had exhausted their authority to search under the warrant by the initial search of the vehicle, new probable cause for the second search was established from defendant's (Graham's) confession, and the second search may therefore be upheld under United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157" (Appendix G).

Petitioner respectfully submits that United States v. Ross, supra, was not intended to apply to situations such as existed with petitioner's automobile.

Even if Graham's confession had given probable cause, it did not give justification for a warrantless search of the car.

Although the "premises" searched was a car, it was not mobile in the sense that would permit the police to invoke the automobile exception to the warrant requirement of the Fourth Amendment.

A warrantless search of an automobile is just as prima facie unreasonable in a constitutional sense as any other warrantless search. (Coolidge v. New Hampshire, 403 U.S. 443; see also Justice Marshall's dissent in United States v. Ross, supra, footnote #1 at page 2174 and footnote #2 at page 2175.

In order to invoke the automotive exceptions, the People must establish either that the car was then essentially mobile, or that it was lawfully in police custody subject to search or inventory. (Carroll v. United States, 267 U.S. 132; Cady v. Dombrowski, 413 U.S. 433; South Dakota v. Opeerman, 428 U.S. 364.

The Lincoln automobile was in no sense mobile on October 20, 1975. It had been parked in one spot since October 14th. It had been under continuous police surveillance since October 17th. The petitioner was in police custody 1000 miles away. The car was simply not about to move.

On the other hand, the car was not in police custody so as to justify an inventory search. It strains logic how the police could claim the necessity of an inventory search, since BCI officer Graham testifed that the search of October 17th had been so through that when he tried to get additional vacuum sweepings on the 20th, not even dust came into the vacuum.

The police did not actually take possession of the car until October 21, 1975, when they removed it to the State of New York.

On October 20th, the car was like any immobile "premises." Petitioner had a reasonable expectation of privacy in the car. The fingerprints were not subject to plain view observation, and nothing with regard to registration requirements justified the warrantless, second intrusion into the vehicle.

This COurt should make it clear to New York State and other jurisdictions, that this Court's decision in United States v. Ross, supra allowing an emergency warrantless search of a vehicle stopped on the highway, does not give authority to the police to make warrantless searches of legally parked vehicles.

6. The decision below gives this Court the opportunity to decide whether the inclusion in a search warrant of the statement "other evidence of homicide used in connection with the crime of murder," when describing what the police may seize, is consistent with the principles articulated by this COurt in Andersen v. Maryland, 427 U.S. 463, or whether they contravene a long line of decisions by this Court which hold that a search warrant must particularly describe the place to be searched and the items to be seized.

The search warrant for the search of petitioner's vehicle authorized a search for: 1) An automatic pistol, 2) fingerprints and palmprints, 3) bloodstains, and 4) other evidence of a homicide used in connection with the crime of murder (Emphasis supplied).

The return states that on October 17, 1975, the police seized: 1) Petitioner's car, 2) a length of rope, 3) identification in the name of

Richard Graham and Iris Graham, 4) Identification in the name of Richard Lucas, 5) suitcase containing miscellaneous mens' clothing, 6) an over/under rifle/shotgun, 7) nine rounds of .20 gauge ammunition and 8) three rounds of 30-30 Remington ammunition (The list of items actually seized totaled over 500 and is attached hereto as Appendix K).

The return listed none of the four items spelled out in the warrant. None of the eight items listed were evidence of a homicide on October 17, 1975. There is absolutely nothing in the testimony of the search warrant applicants that gave probable cause to believe that the eight items seized had anything to do with the homicide, except that the car had been seen near a bank where the victim was supposed to go, at about the time that the victim was supposed to be there (this testimony was later proven false out of the mouth of one of the search warrant applicants). Nevertheless, even accepting that perjurious information, there was insufficient probable cause to indicate that the vehicle was evidence of a crime, and the magistrate did not authorize the seizure of the car.

The Appellate Division held in People v. Graham, 69 A.D.2d 544, (Appendix H) that the inclusion of the statement "other evidence of a homicide used in connection with the crime of murder" was sufficiently specific to overcome the claim of an unconstitutional general warrant, citing Andersen v. Maryland, supra, and Lo Ji Sales, Inc. v. New York, 442 U.S. 319.

The petitioner respectfully submits that the objected to phrase is unconstitutionally broad on two grounds:

1) It allows the police the discretion to seize anything they subjectively think may be evidence, and,
2) It does not even specify that the evidence seized must be related to a particular homicide rather than any ("a") homicide.

The scope of the search conducted on petitioner's vehicle by the police, and the long list of items seized, (see Appendix K) presumably under authority of the statement "other evidence of a homicide...." included in the search warrant, illustrates the abuses that can result from sanctioning that type of general authorization to search and seize, and this Court should take this opportunity to clarify that

Andersen v. Maryland, supra, and Lo Ji Sales, Inc. v. New York, supra, are not authority for magistrates to issue general warrants such as the one issued in this case.

7. This Court should review the decision below to decide whether it is Double Jeopardy to retry petitioner for the crime of Felony Murder committed in the course of Kidnapping, when the Kidnapping has been dismissed on appeal because of a finding that no kidnapping occurred, and a finding that it merged with and was inseparable from the crime of Robbery.

On Petitioner's first appeal to the Appellate Division, (Appendix B) the Court, citing People v. Graham, 69 A.D.2d 544. (Appendix H), held that since petitioner had been convicted of Felony Murder, the predicate felony conviction of Robbery in the First Degree should be dismissed and that the Kidnapping charged merged in the Robbery conviction and therefore vacated both the Robbery and Kidnapping convictions. The Court also dismissed the kidnapping charge because:

> "In addition, the kidnapping charge merged with the robbery since the abduction did not exceed 12 hours before the victim Mitton died (underlining mine), and because it was incidental to and inseparable from the crime of robbery (See People v. Smith, 47 N.Y.2d 83; People v. Cassidy, 40 N.Y.2d 763). Mitton was only abducted in order to get the money he was carrying therefore, since the kidnapping charge merged into robbery, only one predicate felony survived, and it must be considered included in the felony murder conviction." (See Appendix H and B).

That decision was a finding that no kidnapping actually occurred and that insufficient evidence existed to support such a conviction.

That decision was affirmed by the New york Court of Appeals when it dismissed the cross-appeal of the People and stated that the Appellate Division decision was on "the law and the facts" and therefore the Court had no power to entertain the People's appeal (Appendix C).

After remand by the Court of Appeals for retrial, petitioner made application for a new indictment which would delete the kidnapping charge. The original indictment, in addition to a count of Intentional Murder, contained a second count which alleged Felony Murder on the basis of Robbery and/or Kidnapping, one count of kidnapping, and one count of Robbery. (Appendix I). Nevertheless, the trial judge denied petitioner's application for a new indictment.

Further, the Court, over objection, in its charge to the jury advised them that they could find Felony Murder on the basis of a Robbery or a Kidnapping or both (T-1403), and read the jury Section 135.25 of the New York Penal Law (T-1405). This subjected petitioner to Double Jeopardy in violation of the Fifth Amendment to the United States Constitution.

On appeal, the Appellate Division stated that their original dismissal of the kidnapping conviction was not "a determination going to factual innocence," and that in any event, felony murder and the underlying felony are "substantively and generically entirely separate and disconnected offenses (People v. Berzups, 49 N.Y.2d 417, 427, quoting People v. Nichols, 230 N.Y. 221, 226)." The Court of Appeal's decision in Berzups, supra, defies logic. The Court of Appeals conveniently characterizes the underlying felony of a felony murder charge as "not so much an element of the crime but instead functions as a replacement for the mens rea or intent necessary for common-law murder."

It is petitioner's position that the underlying felony of a felony murder is an element of the felony murder, and there cannot be a legal conviction for felony murder unless the underlying felony or an attempt to commit same is established.

Ture, there does not have to be a conviction on the underlying felony, nor does it have to be charged. All that need be shown is that it occurred or was attempted. But when it is found that the underlying felony never existed in the first place, there cannot be a conviction for felony murder based on that non-existent underlying felony.

In this case, for Double Jeopardy considerations, it was not necessary for the Appellate Division to make a finding of factual innocence of kidnapping.[7] They found that the crime never existed in the first place, and that certainly amounts to petitioner being innocent of committing the crime.

This Court should use this case as an opportunity to make the prohibition against Double Jeopardy clear to the COurts below.

8. This case gives this Court the opportunity to decide whether comments of the prosecutor during summation were so unfair as to deprive petitioner of a fair trial and due process of law.

The prosecutor began laying the foundation of his diatribe against the petitioner by stating:

> "Remember, he had six years to figure out what he was going to tell you now. For six years Mr. Lucas has been planning on what he was going to say to you on Friday and Monday." (T-1316).

The prosecutor then went on to say that the case was important to the State of New york, thereby improperly using the weight and prestige of his office to influence the jury (T-1349), and the Court further improperly bolstered the prosecutor's remarks (T-1349-1350).

Four pages of transcript later, the prosecutor says, among other things, the following:

> "The defense does something that is, to me incredible..." "They have the audacity to ask you ...." (Emphasis supplied)

and four pages later (T-1358-59);

> "The most incredible witness in the whole trial testified. The name is Richard Lucas seated right here....."

The prosecutor used the word audacity three times in one paragraph in describing petitioner's argument in summation (T-1354-55), and the prosecutor continually called petitioner a liar; that he had the greatest motive to lie, and that he had six years to plan and rehearse his testimony. (T-1358). (The six year delay of waiting for trial and appeal was not the fault of petitioner).

The the prosecutor said (T-1358-59):

> "And he sat on this witness stand for two hours and he told you a story that went up the peaks and down the valleys and he made all the curves. It was the neatest story for all the damaging evidence you can possibly imagine, of course, after six years, he should have made it a little neater; or, should I say, he made it too neat."

Then a few sentences later at (T-1360):

> "Then he concocted this drug story, a story of a drug deal between Graham and Mitton and other people, and I will tell you there is not a shred of evidence to back it up and no way you can consider it in the jury room."
>
> "And he tells this fairy tale" (T-1361).

The prosecutor makes up a "lie column" and places all witnesses in

that column and says that petitioner claims to be the only one telling the truth (T-1313).

Then,

> "He had no choice but to admit that fact in the great tale and story that he told," (T-1315).
>
> "With all the garbage you heard, pardon my language, the garbage of his having money to spend...." (T-1315).

Such invective is improper, especially when used by one bearing the mantle of District Attorney, and denied the petitioner a fair trial.

The words of Judge Friendly in United States v. Fernandez, 480 F.2d 726, 741, 742 n. 23 (2d Cir 1973) are applicable to this case:

> "In light of our holding in Part III, we are not obliged to pass on the defense's claim of prosecutorial misconduct. However, the summation by the Assistant who tried the case surely went to the verge and perhaps beyond it, as this court warned only last year, the use of first-name epithets at a defendant that might be commonplace in a second-rate movie or television script' is beneath the dignity of the United States Attorney's Office and of the United States as a sovereign, United States v. Benter, 457 F.2d 1174, 1177 (2d Cir. 1972), notwithstanding the sincerity of the prosecutor's belief that the defendant is guilty or that perjury has been committed."

The prosecutor also appealed to the emotions of the jury by referring to the victim's widow:

> "Craig Mitton is dead and Maureen Mitton is without her husband and justice has to be done and is going to be done in this courtroom. That I can tell (T-1316-1317).

A chronological list of the instances where the prosecutor alleged that petitioner lied illustrates why petitioner did not receive a fair trial:

Page 1358.	1.	The most incredible witness in this whole trial testified.
	2.	This is the person who has the greatest motive to lie.
Page 1359.	3.	The only thing he denied, he has to lie about are a few things.
	4.	Lucas had to lie about the telephone call to Jeanie Baker,
	5.	He had to lie about it because it shows motive.
	6.	He has to lie about the drug deal.
	7.	He has to lie about that.

Page 1360.	8.	He has to lie about being parked at the bank.
	9.	And he has to lie about going to Connecticut.
	10.	And he has to lie about getting half of the money.
	11.	Then he concocted this drug story.
Page 1361.	12.	He goes on with that story and tells this fairy tale.
Page 1362.	13.	The question cannot be answered logically because he lied.
	14.	And you can't give a logical answer to a lie.
Page 1364.	15.	Mr. Lucas' testimony should be totally disregarded because it is an absolute lie.
Page 1370.	16.	And we absolutely know because Mr. Lucas' testimony is a lie.

The prosecutor in closing, went into an emotional argument that was irrelevant, immaterial and as prejudicial as he could make it. The prosecutor commented on where the petitioner and others were and what they were doing while the victim was supposedly bleeding to death or dead. One such quote is typical of three pages of transcript:

> "And at about 7:30 or 8:00 that evening, when Graham and Lucas were together counting the blood money, where was Craig Mitton? He was still lying face down at the Brook Haven Bungalow Colony and he was still bleeding to death." (T-1381).

Even if the above were true, it did not have any bearing on the question of whether petitioner was a principle to the murder. Three full pages of transcript alluding to the acts of petitioner, and including the suffering or death of the victim, in the manner of the argument, has no probative value and was meant only to inflame the passions of the jurors. It was the basest sort of summation, and should be condemned in no uncertain terms.

The end of that diatribe was:

> "(Craig Mitton) screaming out for you to do him justice." (T-1383).

To quote Mr. Justice Sutherland's classic statement of the prosecutor's role:

> "(He) is the representative not of an ordinary party to a controversy, but of a sovereinty whose obligation to govern impartially is as compelling as it its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

> shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. he may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not al liberty to strike foul one. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 2d 1314 (1935)

A wrongful conviction of petitioner occurred as a result of the foul blows struck by the prosecutor in his case, and this Court should grant certiorari and use this case to make clear to the State of New York and other jurisdictions, that convictions obtained by these methods and in violation of due process of law, are improper and will not be tolerated.

> This Court should review the decision below because the Appellate Division has upheld the introduction at petitioner's trial of prejudicial evidence not connected to the crime, thereby depriving petitioner of a fair trial and due process of law.

As part of the multitude of items seized from petit.oner's vehicle pursuant to the search of October 17, 1975, the police seized a shotgun, shells and rope. These items were not set forth in the warrant. There was no issue but that the shotgun was legally owned and registered in petitioner's name).

Petitioner, in his Omnibus Motion, prior to the second trial, asked for suppression of the shotgun. The trial Court's decision stated:

> SUPPRESSION OF SHOTGUN
> "Denied, the discovery of fingerprints of deceased in defendant's automobile trunk may allow the jury to conclude his presence therein was coerced, and a handy means of coercion used, the jury may find, was the shotgun." (Appendix I).

The shotgun, shells and rope were marked for identification during the trial (T-570) and later, admitted in evidence (T-829(. There was objection to each on the grounds of materiality (T-628, 630) and, at first, the Court sustained the objections. However, over objection, they were later admitted in evidence even though no connection had been made between those items and the alleged crimes (T-829-831).

It was admitted that the victim could not have been shot with this gun (T-700), and there was no evidence produced during the trial that

either the rope or the gun had been used in the crime.

This error was greatly enhanced, because the Court, during its charge, indicated that petitioner was entitled to have an affirmative defense under Section 125.25 subd. 3 of the New York Penal Law charged to the jury. Part of that charge was (T-1414):

> "(b) was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury...."

also, (T-1415) :

> "Therefore, the affirmative defense is established by a preponderence of the evidence when the proof...that the defendant...was not armed..."

The shotgun, having been allowed in evidence over objection, created a strong possibility that the one item alone was considered by the jury as negating petitioner's affirmative defense.

Even if the language in the search warrant allowing the police to search for and seize "other evidence of a homicide...." was not unconstitutionally overbroad, thereby making it a general warrant, the shotgun, shell and rope should have been suppressed because they were not "other evidence of a homicide".

The introduction of those items at petitioner's trial improperly influenced the jury and denied petitioner a fair trial and due process of law.

> This Court should review the decision below because the lower courts have failed to comply with the mandates of this Court that guilt must be proven beyond a reasonable doubt.

It was obvious from the wounds to the victim that they were intentionally inflicted upon him, but taking the evidence in a light most favorable to the People, there was no evidence as to who it was that inflicted those wounds.

The only circumstantial evidence presented against petitioner was that he had been seen at a bank at 4:30 p.m. and that the victim had left for that bank at 4:30 - 4:45 p.m., that petitioner was with Graham at 8:00 p.m. with what was presumed to be the money that the victim had previously possessed, and the victim's fingerprints had been found on the inside trunk lid of petitioner's automobile.

The above facts are susceptable to so many innocent explanations

that it cannot be said that they are only consistent with petitioner being present when the victim was killed.

The foregoing, of course, was the evidence at the end of the People's case, before petitioner testified. The defense made the appropriate motions at the end of the People's case (T-873-875).

As to Intentional Murder, there was absolutely no evidence, circumstantial or otherwise, to support such a charge against petitioner, Whoever killed the victim, their intent cannot be imputed to the petitioner. Without proof of any sort that petitioner either fired the gun or that he shared the intent of another to fire the gun, there cannot be a conviction for intentional murder.

Other than the perjurious testimony by BCI Officer Reidy, that petitioner had admitted that "he might have been there" (see Point 3, Supra), there was absolutely no evidence to show that petitioner had been anywhere near the scene of the murder.

Also, petitioner had never been seen with a gun. Witnesses called by the defense and prosecution testified to seeing Graham with a holster strapped to his leg (T-401, 507, 879, 1053-1054, 1187). People's witness Roberta Holmes saw a gun in a brown bag placed in her closet by Graham (T-359-360). Bank employee Arnold saw a gun in Graham's bag when he was at the bank on October 14, 1975. (T-544). Prosecution witness Kilb, who lived with petitioner on and off never saw petitioner with a gun (T-497-498). The only firearm attributed to petitioner was an over/under rifle/shotgun which the State Police testified was not used in the killing (T-700). As a matter of fact, the only gun identified by anyone as being possessed by Graham did not match the type of gun used in the killing (T-544, 554-557, 1054).

It therefore cannot be inferred as to who fired the gun; whether it was a third person, Graham or petitioner. Assuming there could be any inference as between Graham and petitioner, then the inference would be more reasonable that it was Graham.

The People failed to prove a specific intent on the part of petitioner to murder, and filed to show a specific intent of Graham to commit murder which was shared by petitioner and therefore,

petitioner's guilt was not proven beyond a reasonable doubt.

Similarly, based on the Appellated Court's decision which dismissed the kidnapping count of the indictment (Appendix B), the only way that petitioner could be convicted of Felony Murder is if the jury could have found, on the evidence, proof of a robbery, by petitioner, as principle or accessory beyond a reasonable doubt; but the trial court refused to charge this although requested.

There was no intent or shared intent shown on the part of petitioner. He had part of the money, but that may show an intent to be a possessor of stolen property, rather than a robber or accomplice to a robbery. People v. Batten, 40 A.D.2d 549, affirmed 31 N.Y.2d 737. In fact, there is no evidence, even circumstantially, to show that unambiguously, Graham did not receive the money from Mitton or others voluntarily turning over the money, to Graham or another.

The United States Constitution prohibits the criminal conviction of any person except upon proof of guilty beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed 2d 368, and the test on appeal is not whether there was any evidence to support a conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonbale doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560.

Petitioner respectfully submits that the evidence in his case does not meet that standard, and that the Courts below upheld his conviction based on a finding of a "mere modicum" of evidence. Jacobellis v. Ohio, 378 U.S. 184, 202, 84 S. Ct. 1676, 12 L.Ed.2d 793, rather than on a finding of proof of guilty beyond a reasonable doubt.

Therefore, this Court should grant certiorari in this case and intervene on petitioner's behalf and on behalf of other similarly situated defendants, to make clear that criminal convictions can only be upheld if they are obtained by proof of guilt beyond a reasonable doubt.

11. This Court should review the decision below to decide whether a sentencing Court must take rehabilitation of the offender into consideration when the state's Penal Law mandates that it be considered.

The trial judge, at the time of sentencing of petitioner stated: (S-8)

> "To my mind, the punishment here should be based on retribution rather than any thought of rehabilitation rather than any thought of rehabilitation of the terribly, terribly aggravated nature of this crime. That's my thinking on the subject."

The judge went on to say:

> "...this is the typical case that would warrant capital punishment and you know, when you have capital punishment you have very little opportunity for rehabilitation."

Three letters were presented from officials of the New York correctional system indicating petitioner's rehabilitation (S-14).

Petitioner's attorney's allocation requested that the Court take cognizance of petitioner's rehabilitation (S-14).

The petitioner himself allocated and asked for rehabilitation consideration in being sentenced (S-17).

The trial Court erred when it stated that it didn't believe there was pennance and remorse (S-17). It is difficult for an innocent man who has been wrongfully convicted to say he is sorry for something he did not do. But petitioner did indicate his remorse for anything he may have done (S-16).

The refusal of the Court to consider rehabilitation violated Section 1.05 subd. 6 of the New York Penal Law, (see also People v. Burgh, 89 A.D.2d 672, and People v. Farrar, 52 N.Y.2d 302, 305), and deprived petitioner of fundamental fairness, as required by the Due Process clauses of the 5th and 14th Amendments to the United States Constitution. Such is also a violation of the 8th Amendment to the United States Constitution in that, unless rehabilitation is considered, there is cruel and unusual punishment. Refusal to consider rehabilitation, as the Court did so in petitioner's case, is also a denial of equal protection of the law in violation of the 14th Amendment to the United States Constitution and calls for the intervention of his Court on behalf of petitioner and other similarly situated defendants.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

DATED: July 12, 1985

Richard P. Lucas

Richard P. Lucas, 78-A-2362
Petitioner pro se
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

vehicle ... motorist (Insurance Law, § 5202, subd. [A], par. 1). The Insurance Law affords protection to "insured" and "qualified" individuals (Insurance Law, § 5201 *et seq.*). However, these two categories are mutually exclusive (*Matter of Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 10, 342 N.Y.S.2d 845, 295 N.E.2d 647; *Matter of Wallace v. MVAIC, supra*, 25 N.Y.2d pp. 386–387). An "insured" must recover under the uninsured motorist clause required in all insurance policies (Insurance Law, § 167, subd. 2-a) or, lacking such status, resort to a suit against MVAIC. An "insured" includes anyone who is protected by the uninsured motorist endorsement which is required in all policies issued in New York (Insurance Law, § 5202, subd. [A], par. 9; § 167, subd. 2-a). If the endorsement is not expressly included, it will be implied (Insurance Law, § 167, subd. 2-a). Uninsured motorist endorsements cover, *inter alia*, the named insured and, while residents of the same household, his spouse and the relatives of either (30 N.Y.Jur., Insurance, § 1246, p. 688).

[6–8] Since decedent lived in the same house with his parents and his parents had an insurance policy with the required uninsured motorist endorsement, it appears that decedent was an "insured" and, therefore, not entitled to recover against MVAIC. Petitioner's claim that he is not "insured", and thus "qualified", based on the letter from the insurance company alleging there was no uninsured motorist coverage because this was a motorcycle accident, is unpersuasive. Motorcycles are not statutorily exempted from uninsured motorist coverage (*Matter of Len [Lumbermens Mut. Cas. Co.]*, 80 A.D.2d 682, 436 N.Y.S.2d 431; *Matter of Askey [General Acc. Fire & Life Assur. Corp.]*, 30 A.D.2d 632, 290 N.Y.S.2d 759, affd. 24 N.Y.2d 937, 302 N.Y.S.2d 576, 250 N.E.2d 65). Moreover, the uninsured motorist endorsement is to be construed in favor of inclusion in determining whom it covers (see *Matter of CountryWide Ins. Co. v. Wagoner*, 45 N.Y.2d 581, 586, 412 N.Y.S.2d 653, 384 N.E.2d 653). We note that petitioner never produced the insurance ... as evidence that ... an "insured". The evidence produced by petitioner was insufficient to establish that decedent was not an "insured".

Finally, we note that the parties did not raise or discuss the issue of whether the application of petitioner was premature since it has been held that a cause of action for wrongful death in such circumstances does not accrue until the appointment of an executor or an administrator (see *Matter of Sellars v. Motor Vehicle Acc. Ind. Corp.*, 20 A.D.2d 350, 353, 246 N.Y.S.2d 937). Consequently, we do not address that issue.

Order reversed, on the law, without costs, and petitioner's application denied.

The PEOPLE of the State of New York, Respondent,

v.

Richard P. LUCAS, Appellant.

Supreme Court, Appellate Division, Third Department.

Oct. 25, 1984.

Defendant was convicted of crimes charged in indictment, 95 Misc.2d 334, 406 N.Y.S.2d 1019, and on appeal convictions of intentional murder and felony-murder were affirmed, 73 A.D.2d 699, 422 N.Y.S.2d 534, but convictions of robbery and kidnapping were vacated. Murder convictions were then reversed by the Court of Appeals, 53 N.Y.2d 678, 439 N.Y.S.2d 99, 421 N.E.2d 494, and case was remanded for a second trial. On remand, defendant was convicted in the County Court, Sullivan County, Scheinman, J., of two counts of murder in the second degree, and he appealed. The Supreme Court, Appellate Division, held that: (1) dismissal of robbery and kidnapping counts did not affect the two murder counts of the indictment upon which defendant was retried; (2) principle of double jeopardy did not bar retrial on ground that robbery and kidnapping charges served as underlying felonies; (3) trial court did not err in responding to jury's request for a clarification of reasonable doubt nor in refusing defendant's request to charge definition of immediate flight; (4) instruction on criminal liability for conduct of another was not erroneous; (5) a new trial was not required as the result of prosecutor's conduct; and (6) evidence, although circumstantial, was sufficient to sustain conviction notwithstanding that defendant testified to a version of the facts that established his innocence.

Affirmed.

1. Criminal Law ⇐1190

Appellate Division's dismissal of robbery and kidnapping counts did not affect two murder counts of indictment upon which defendant was retried.

2. Criminal Law ⇐161

Fundamental to prohibition against double jeopardy is a determination going to factual innocence. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐200(1)

A determination of factual innocence as to underlying felony will not bar a retrial of the felony-murder count under the principle of double jeopardy if felony-murder and the underlying felony are substantively and generically entirely separate and disconnected offenses. U.S.C.A. Const. Amend. 5.

4. Criminal Law ⇐200(1)

Retrial of the felony-murder count was not barred by the principle of double jeopardy, notwithstanding Appellate Division's dismissal of the robbery and kidnapping charges, where the dismissal was not a determination going to factual innocence and, even if it was, felony-murder and robbery and kidnapping were substantively and generically separate and disconnected offenses. U.S.C.A. Const.Amend. 6.

5. Homicide ⇐289

Trial court did not err in instructing jury that either robbery or kidnapping could serve as the underlying felony for felony-murder.

6. Criminal Law ⇐863(2)

Decision to respond to jury's request for clarification of reasonable doubt in murder prosecution by repeating rather than expounding upon an adequate original charge was not error.

7. Homicide ⇐289

Refusing to charge the definition of immediate flight, as that term was used in the felony-murder statute, was not error in absence of evidence that victim was killed after defendant had effectuated his escape following completion of underlying felonies. McKinney's Penal Law § 125.25, subd. 3.

8. Homicide ⇐286(1)

Instruction on criminal liability for conduct of another appropriately instructed jury on issue of intent in murder prosecution and was not erroneous.

9. Criminal Law ⇐1171.1(1)

Prosecutor's tactics in murder prosecution, though they may have occasionally strayed beyond bounds of proper advocacy, did not so prejudice defendant as to deprive him of a fair trial.

10. Criminal Law ⇐1166.23

Brief colloquy between defense counsel and trial court following counsel's objection to prosecutor's summation did not violate defendant's right to a fair trial.

11. Searches and Seizures ⇐3.8(1)

Second search of defendant's vehicle, conducted three days after initial search pursuant to a search warrant, was not illegal and did not require suppression of items seized. U.S.C.A. Const.Amend. 4.

12. Homicide ⇐251

Evidence, although circumstantial, was sufficient to sustain conviction of two counts of murder in the second degree.

13. Homicide ⇐254

In second-degree murder prosecution, mere fact that defendant testified to a version of the facts which would establish his innocence did not preclude the jury from returning a guilty verdict based upon the competing facts and inferences of the People's case.

14. Homicide ⇐354

Conduct of sentencing court when, although considering rehabilitation, it rejected same as a basis for fixing sentence in circumstances of homicide prosecution was not an abuse of discretion.

Carl J. Silverstein, Legal Aid Society of Sullivan County, Monticello, for appellant.

Stephen L. Lungen, Dist. Atty., Monticello, for respondent.

Before MAIN, J.P., and CASEY, MIKOLL, LEVINE and HARVEY, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Sullivan County, rendered October 28, 1981, upon a verdict convicting defendant of two counts of the crime of murder in the second degree.

Defendant was indicted in December, 1975 on charges of robbery, kidnapping, intentional murder and felony murder following the discovery of the body of Craig Mitton, who, along with the $25,647.19 he was supposed to deposit for his employer, had disappeared on October 13, 1975. Defendant and his codefendant, Richard Graham, were apprehended in Florida on October 19, 1975. A search of defendant's vehicle revealed Mitton's fingerprints on the inside of the trunk lid. The police investigation also led to the discovery of safe deposit boxes in New Jersey, obtained by defendant and Graham the day after Mitton was murdered, containing in excess of $20,000.

After separate jury trials, defendant and Graham were convicted of the crimes charged in the indictment. 95 Misc.2d 334, 406 N.Y.S.2d 1019. On defendant's appeal, this court affirmed the murder convictions, but vacated the robbery and kidnapping convictions on the theory that they merged into the felony murder (73 A.D.2d 699, 422 N.Y.S.2d 534). The Court of Appeals reversed the murder convictions, concluding that defendant's statement to the police during the return flight from Florida was taken in violation of defendant's right to counsel (53 N.Y.2d 678, 439 N.Y.S.2d 99, 421 N.E.2d 494). Defendant was retried on the intentional murder and felony murder counts of the indictment, and he was convicted of both counts. The case is here on appeal from the judgment rendered upon the second trial.

Defendant has alleged numerous errors in his brief on appeal. Although our discussion herein does not deal at length with all of the issues, we have considered each and every error asserted by defendant and find that none of them, either individually or collectively, require reversal. Accordingly, the judgment must be affirmed.

[1-5] As the basis for several of the alleged errors, defendant points to this court's prior dismissal of the counts of the indictment charging robbery and kidnapping (73 A.D.2d 699, 422 N.Y.S.2d 534, *supra*). Citing *People v. Mayo*, 48 N.Y.2d 245, 422 N.Y.S.2d 361, 397 N.E.2d 1166, defendant claims that he was improperly retried on the original indictment. Unlike *Mayo*, wherein the trial court had dismissed the sole charge of a single-count indictment for insufficient evidence, leaving no valid count upon which a retrial could be had, this court's dismissal of the robbery and kidnapping counts left unaffected the two murder counts of the indictment upon which defendant was retried. It is noteworthy that the Court of Appeals, after reversing the murder convictions, remitted this case to the trial court "for further proceedings on the indictment" (53

N.Y.2d 678, 683, 439 N.Y.S.2d 99, 421 N.E.2d 494, *supra*). Defendant also argues that the principle of double jeopardy barred retrial of the felony murder count since the robbery and kidnapping charges dismissed by this court served as the underlying felonies. Fundamental to the prohibition against double jeopardy is "a determination going to factual innocence" (*Matter of Pastrana v. Baker*, 55 N.Y.2d 315, 319, 449 N.Y.S.2d 461, 434 N.E.2d 697), and this court's dismissal of the robbery and kidnapping charges clearly did not constitute such a determination. In any event, felony murder and the underlying felony are "substantively and generically entirely separate and disconnected offenses" (*People v. Berzups*, 49 N.Y.2d 417, 427, 426 N.Y.S.2d 253, 402 N.E.2d 1155, quoting *People v. Nichols*, 230 N.Y. 221, 226, 129 N.E. 883). Thus, even a determination of factual innocence of the underlying felony will not bar a retrial of the felony murder count (*People v. Murray*, 92 A.D.2d 617, 459 N.Y.S.2d 810). It is further argued that the trial court erred in instructing the jury that either robbery or kidnapping could serve as the underlying felony for felony murder. The felony murder count of the indictment alleged both robbery and kidnapping as underlying felonies and, as noted above, this court's dismissal of the robbery and kidnapping counts left unaffected the felony murder count of the indictment. Accordingly, we reject defendant's claim that the trial court was precluded from charging kidnapping as a possible underlying felony.

[6-8] Concerning the charge to the jury, defendant also contends that the trial court erred in responding to the jury's request for a clarification of reasonable doubt and in refusing defendant's request to charge the definition of immediate flight, as that term is used in the felony murder statute (Penal Law, § 125.25, subd. 3). Under the circumstances herein, we perceive no error in the trial court's decision to respond to the jury's request for clarification of reasonable doubt by repeating rather than expounding upon an adequate original charge (*People v. Malloy*, 55 N.Y.2d 296, 303, 449 N.Y.S.2d 168, 434 N.E.2d 237, cert. den. 459 U.S. 847, 103 S.Ct. 104, 74 L.Ed.2d 93). Nor did the court err in refusing to charge the definition of immediate flight, for unlike *People v. Gladman*, 41 N.Y.2d 123, 390 N.Y.S.2d 912, 359 N.E.2d 420, where the defendant killed a police officer at a point remote both in time and place from the underlying robbery, the evidence herein does not present a factual issue as to whether the victim Mitton was killed after defendant had effectuated his escape following completion of the underlying felonies. We also find that the trial court's charge concerning criminal liability for the conduct of another (Penal Law, § 20.00) appropriately instructed the jury on the issue of intent (see *People v. Gibson*, 65 A.D.2d 235, 237, 411 N.Y.S.2d 71, lv. to app. den. 46 N.Y.2d 1080, cert. den. 444 U.S. 861, 100 S.Ct. 127, 62 L.Ed.2d 83) and, therefore, the court's refusal to further charge as requested by defendant does not require reversal.

[9, 10] We reject defendant's claim that a new trial is required as a result of the prosecutor's conduct. Our examination of the record does not reveal the type of flagrant pervasive pattern of prosecutorial misconduct, the cumulative effect of which has led appellate courts to order a new trial (see, e.g., *People v. Whalen*, 59 N.Y.2d 273, 280-281, 464 N.Y.S.2d 454, 451 N.E.2d 212; *People v. Mott*, 94 A.D.2d 415, 465 N.Y.S.2d 307; *People v. Dowdell*, 88 A.D.2d 239, 453 N.Y.S.2d 174). Taken in context, and considering the length of the trial, the issues raised and the instructions given by the trial court, we conclude that while the prosecutor may have occasionally strayed beyond the bounds of proper advocacy, the prosecutor's tactics did not so prejudice defendant as to deprive him of a fair trial (see *People v. Galloway*, 54 N.Y.2d 396, 446 N.Y.S.2d 9, 430 N.E.2d 885; *People v. Keppler*, 92 A.D.2d 1032, 461 N.Y.S.2d 513; *People v. Hopkins*, 86 A.D.2d 937, 940, 448 N.Y.S.2d 574, affd. 58 N.Y.2d 1079, 462 N.Y.S.2d 639, 449 N.E.2d 419). Nor do we find any merit in defendant's claim that he was denied a fair trial by the brief colloquy

between defense counsel and the trial court after one of counsel's objections during the prosecutor's summation.

[11] Next, there is no merit in defendant's claims that certain rulings by the court during the retrial require reversal. We also find no error in the trial court's *Sandoval* ruling, and we reject defendant's claim that the second search of his vehicle, conducted three days after the initial search pursuant to a search warrant, was illegal, requiring suppression of the items seized (see *People v. Graham*, 90 A.D.2d 198, 204-205, 457 N.Y.S.2d 962, lv. to app. dsmd. 59 N.Y.2d 766, 464 N.Y.S.2d 1029, 451 N.E.2d 508, cert. den. — U.S. —, 104 S.Ct. 246, 78 L.Ed.2d 234).

[12, 13] Concerning defendant's argument as to the sufficiency of the proof, the Court of Appeals rejected defendant's claim that the indictment should have been dismissed at the close of the first trial (53 N.Y.2d 678, 681, 439 N.Y.S.2d 99, 421 N.E.2d 494, *supra*), and we reach the same conclusion herein since the proof at the second trial was substantially the same. Although circumstantial, the evidence was sufficient to support the jury's verdict. The mere fact that defendant testified to a version of the facts which would establish his innocence did not preclude the jury from returning a guilty verdict based upon the competing facts and inferences of the People's case (see *People v. Pena*, 50 N.Y.2d 400, 409, 429 N.Y.S.2d 410, 406 N.E.2d 1347, cert. den. 449 U.S. 1087, 101 S.Ct. 878, 66 L.Ed.2d 814).

[14] Finally, we reject defendant's claim that he must be resentenced. Unlike *People v. Burgh*, 89 A.D.2d 672, 453 N.Y.S.2d 783, the record convinces us that the sentencing court did in fact consider rehabilitation, but in its discretion rejected that factor as a basis for fixing the sentence in the circumstances of this case. Since there was no abuse of discretion, the sentence should not be disturbed.

Judgment affirmed.

Robert D. McGINNIS, Respondent,

v.

TOWN OF ROTTERDAM, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Third Department.

Oct. 25, 1984.

Passenger brought action to recover for injuries sustained when vehicle in which he was riding allegedly went off a roadway due to failure of town to erect a "dead end" sign and to driver's impaired ability caused by alcohol. The Supreme Court, Trial Term, Schenectady County, Viscardi, J., dismissed the action against all defendants other than town and driver and subsequently entered judgment on jury verdict of $220,000 in favor of passenger and against both town and driver on an equal liability basis, and appeal was taken. The Supreme Court, Appellate Division held that the verdict was fair and reasonable and not excessive, in view of passenger's serious injuries, permanent loss of serviceable hearing in left ear and permanent loss of 40 to 45 percent of hearing in right ear, partial facial paralysis, extensive scarring, and continuing problem with loss of balance.

Judgment affirmed.

Damages ⇐132(14)

Jury verdict of $220,000 against town and driver and in favor of 19-year-old passenger of vehicle was not excessive or unfair, where passenger suffered serious injuries, permanent loss of serviceable hearing in left ear and permanent loss of 40 to 45 percent of hearing in right ear, partial facial paralysis, extensive scarring, and a continuing problem with balance.

James L. Pemberton, Schenectady, for appellant Town of Rotterdam.

APPENDIX B

Counties ⇐67

Record supported determination that Commissioner of Social Services for Delaware County had failed to file oath of office within the statutory period and, hence, that no hearing on charges was required in order to dismiss him from office. CPLR 7801 et seq.; Public Officers Law §30.

G. G. Kramer, Sidney, for petitioner.

Robert H. McDowell, Delaware County Atty., Stamford, for respondent.

Before SWEENEY, J. P., and KANE, STALEY, MAIN and MIKOLL, JJ.

MEMORANDUM DECISION.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Delaware County) to review a determination of the Board of Supervisors of Delaware County, which dismissed petitioner from his position as Commissioner of Social Services for Delaware County.

This matter was previously before this court and the pertinent facts need not be repeated here as they are sufficiently set forth in our memorandum decision in *Matter of Comins v. County of Delaware*, 66 A.D.2d 966, 412 N.Y.S.2d 428. Determination was withheld and the matter was remitted by this court to the Trial Term of Supreme Court, Delaware County, for a trial and decision resolving the issue of whether petitioner filed his oath of office within 30 days after notice of his appointment, or within 30 days after commencement of his term pursuant to section 30 of the Public Officers Law. A trial was held and Trial Term determined that there was a failure to file an oath of office within the statutory period set forth in section 30 of the Public Officers Law. We are of the view that Trial Term properly decided the issue concerning petitioner's failure to timely file an oath of office. As we previously stated, if petitioner did fail to timely file, no hearing on charges was required in order to dismiss him from office (*Matter of Comins v. County of Delaware*, *supra*). Accordingly, the determination of the Board of Supervisors of Delaware County should be confirmed.

Determination confirmed, and petitions dismissed, without costs.

73 A.D.2d 699

The PEOPLE of the State of New York, Respondent,

v.

Richard P. LUCAS, Appellant.

Supreme Court, Appellate Division, Third Department.

Dec. 6, 1979.

Defendant was convicted in County Court, Sullivan County, 95 Misc.2d 334, 406 N.Y.S.2d 1019, Louis E. Scheinman, J., of murder and other crimes, and he appealed. The Supreme Court, Appellate Division, Third Division, Third Department, held, inter alia, that a delay of 31 months between defendant's arrest and commencement of his trial did not constitute unreasonable delay where it was largely caused by defendant himself.

Modified and affirmed.

1. Criminal Law ⇐1172.1(1)

Errors in jury charge in murder-kidnapping prosecution, if any, were not so substantial as to deprive defendant of fair trial or require reversal of his conviction.

2. Criminal Law ⇐577.15(3)

Delay of 31 months between defendant's arrest on murder-kidnapping charges and commencement of his trial did not constitute unreasonable delay where it was occasioned, in large part, by defendant's own actions.

...statements of murder suspect to police investigator after suspect's arrest was properly admitted in evidence after prosecution met its burden of proving that statement was voluntary and spontaneous. U.S.C.A. Const. Amend. 5.

4. Homicide ⇐254

Overwhelming evidence supported defendant's conviction of second-degree murder.

Carl J. Silverstein, Monticello, for appellant.

Stephen F. Lungen, Asst. Dist. Atty. of Sullivan County, Liberty, for respondent.

Before SWEENEY, J. P., and STALEY, MAIN, MIKOLL and HERLIHY, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Sullivan County, rendered July 14, 1978, upon a verdict convicting defendant of murder in the second degree (two counts), kidnapping in the first degree, and robbery in the first degree.

Craig R. Mitton, who collected daily revenues from service stations for his employer, Mid-Valley Petroleum Corporation of Newburgh, New York, disappeared after leaving company offices at approximately 4:30 P.M. on October 13, 1975 to make a deposit which totalled $25,647.19. His body, bearing three bullet wounds and marks of a blow to the head, was discovered in Sullivan County two days later. The coroner indicated that based on his findings, Mitton had been shot between 4:00 P.M. and 7:00 P.M. on October 13, 1975.

At approximately 4:00 P.M. on October 13, 1975 defendant and another person were seen in defendant's car near the bank at which Mitton was to make the deposit. Earlier in the day defendant had been with one Richard Graham. Graham had been fired on October 1, 1975 from the position Mitton held because he had misappropriated company funds, and because he had retained a $30,000 deposit overnight.

...time between 7:30 P.M. and 8:00 P.M. on October 13, 1975 defendant and Graham arrived at the home of defendant's girlfriend, Cheryl Kilb, in Walden, New York. Also at the house was Roberta Holmes, who was Graham's girlfriend. Later that evening, the four drove to Newark, New Jersey, where they spent the night.

The following day defendant and Graham purchased travelers checks, and each opened a safe deposit box, giving addresses in Newark, New Jersey. Later, when police officers opened these boxes, each contained over $10,000 in cash. On October 18, 1975 the police learned that defendant and Graham were registered in a motel in Dania, Florida. On October 19 the police entered the motel rooms and arrested defendant. Defendant waived an extradition hearing, and was returned to New York. While enroute to New York, defendant told a police officer that, if he could talk to the District Attorney, he could explain that he did not do everything.

After trial, the jury found defendant guilty of intentional murder, felony murder, kidnapping in the first degree, and robbery in the first degree. He was sentenced to a term of 25 years to life on the intentional murder conviction; 25 years to life on the felony murder conviction; 25 years to life on the kidnapping conviction; and eight and one-third to 25 years on the robbery conviction—the first three sentences to run concurrently, and the last to run consecutively.

Defendant's first contention is that the sentence was improper because: (1) the kidnapping charge merged with the robbery conviction; (2) since he had been convicted of felony murder, the predicate felony should have been dismissed as a lesser included offense; and (3) in any event, the court should not have imposed a consecutive term on the robbery conviction.

On the appeal to this court from the judgment of conviction of Graham on identical counts, it was held that, since Graham was convicted of felony murder, the predicate felony charge of robbery should be dismissed, and also that the kidnapping

charge merged into the robbery charge. In the Graham case, the judgments imposed for conviction of kidnapping in the first degree and robbery in the first degree were vacated, and the counts of the indictment therefor were dismissed (*People v. Graham*, 59 A.D.2d 544, 549, 419 N.Y.S.2d 290, 293). Accordingly, the judgment convicting defendant of the charges of kidnapping and robbery should be vacated, and the counts of the indictment therefor should be dismissed.

[1] Defendant asserts that the trial court made numerous errors in its charge to the jury. Some of the alleged errors were not objected to and, therefore, were not preserved for review (CPL 470.05, subd. 2; *People v. Patterson*, 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898). Most of the objections to the charge were frivolous and if some errors do exist, they were not so substantial as to deprive defendant of a fair trial, or to require a reversal (*People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. Harris*, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349).

[2] Defendant further argues that the 31 months which elapsed between his arrest on October 19, 1975 and the commencement of his trial on May 15, 1978 constituted unreasonable delay as a matter of law. The District Attorney concedes that, if the entire delay were attributable to him, defendant's right to a speedy trial might well have been violated. However, the prosecution maintains that most of the delay is attributable to defendant.

The period from December 4, 1975 until May 26, 1976, approximately six months, was taken up with defendant's making his omnibus motion, and entering the order thereon. Defendant also made other motions prior to June 2, 1977 when the People were ready to proceed to trial. Moreover, defendant indicated on June 2, that he was not ready for trial, and asked that the Graham case be tried first.

Graham's trial ended on October 14, 1977. On November 11, 1977 the District Attorney again moved this case for trial, but defendant claimed that he was about to move for a change of venue. Such motion was made on December 15, 1977 and was denied on February 2, 1978. In the meantime, defendant's counsel had withdrawn. Present counsel was appointed on February 13, 1978 and proceeded to bring 10 motions over the next four months. Trial was eventually commenced on May 15, 1978. Based on these facts, most of the delay was attributable to defendant, and his contention should be rejected (*People v. Goldsweer*, 48 A.D.2d 748, 368 N.Y.S.2d 323, affd. 39 N.Y.2d 656, 385 N.Y.S.2d 274, 350 N.E.2d 604).

[3] When defendant was arrested on October 19, 1975, he was advised of his constitutional rights and, upon his arrival at the police station, he executed a *Miranda* waiver, and indicated he wanted an attorney. Defendant now contends that the statement he made on the plane to Investigator Reidy, prior to his representation by counsel, to the effect that if he could talk to the District Attorney he could explain that he did not do everything, was inadmissible. The court ruled that the statement was admissible on the ground that the evidence established that the statement was spontaneous.

After defendant waived extradition, he was transported back to New York by airplane accompanied by Investigator Reidy. During the flight, defendant initiated a conversation with Reidy with his main line of inquiry relating to what, if anything, the District Attorney would do for him with respect to the homicide.

Volunteered spontaneous statements are admissible, and such statements are not barred by the Fifth Amendment (*People v. Robles*, 27 N.Y.2d 155, 314 N.Y.S.2d 793, 263 N.E.2d 304; *People v. Kaye*, 25 N.Y.2d 13..., 303 N.Y.S.2d 41, 250 N.E.2d 329). The record supports the finding that the prosecution met its burden of proving that defendant's statement was voluntary and spontaneous and, therefore, admissible.

[4] We have considered the other contentions of defendant, and find that either

they are without merit, or were reviewed and disposed of in *People v. Graham* (*supra*). In view of the overwhelming evidence proving defendant's guilt beyond a reasonable doubt, the judgment of conviction of murder in the second degree should be affirmed, and the convictions of kidnapping in the first degree and robbery in the first degree should be reversed.

Judgment modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

73 A.D.2d 700

The PEOPLE of the State of New York, Respondent,

v.

Joyce G. DUNTLEY, Appellant.

Supreme Court, Appellate Division, Third Department.

Dec. 6, 1979.

Appeal was taken from a judgment of the County Court of Essex County, Charles P. Garvey, J., under verdict convicting defendant of burglary in the second degree and criminally negligent homicide. The Supreme Court, Appellate Division, held that: (1) findings in support of denial of pretrial motion to suppress written confession could not be disturbed, and (2) absent exception to submission of issue of criminally negligent homicide as lesser included offense of second-degree manslaughter, any apparent inconsistency in the verdict rendered was not reviewable.

Affirmed.

1. Criminal Law ⇐531(3)

In ruling on motion to suppress written confession the trial court was entitled to discredit defendant's version of circumstances under which it was obtained, especially since testimony of remaining witnesses established beyond a reasonable doubt that the challenged statement was voluntarily given following proper *Miranda* admonitions.

2. Criminal Law ⇐531(2)

Fact that interrogation was of short duration, that defendant was allowed to and did converse with a friend and that she, as well as police, had made arrangements for care of her children were relevant considerations in determining voluntariness of written confession.

3. Criminal Law ⇐1053

Although evidence did not justify submission of criminally negligent homicide as lesser included offense of second-degree manslaughter appellate review of such submission was precluded absent any exception to the submission. CPL 300.50, subd. 1.

Livingston L. Hatch, Keeseville (Emily C. Neville, Keene Valley, of counsel), for appellant.

John C. McDonald, Essex County Dist. Atty., Ticonderoga (Edward D. Saslaw, Carmel, of counsel), for respondent.

Before SWEENEY, J. P., and KANE, STALEY, MIKOLL and HERLIHY, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Essex County, rendered June 7, 1978, upon a verdict convicting defendant of the crimes of burglary in the second degree and criminally negligent homicide.

[1, 2] We have carefully examined all of the issues presented by defendant on this appeal and conclude that only a few of them merit discussion. Her pre-trial motion to suppress a written confession was properly resolved. The trial court obviously discredited her version of the circumstances

APPENDIX C

and the admissions made, the detention was supported by probable cause.

Finally, we reject defendant's reading of *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824, *supra*, which he contends requires suppression of all evidence gathered during an illegal detention. The fact that an illegal detention is not to be construed as a predicate for immunity from the gathering or introduction of incriminating evidence (see *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537, *supra*) is supported by the fact that in *Brown v. Illinois* (*supra*), as well as other cases, the United States Supreme Court emphasized that there are legitimate ways to remove the taint of illegality. Significantly, as distinguished from this case, *Dunaway* involved the narrower question of the propriety of custodial detentions for investigative purposes when probable cause does not exist. While we agree that such an unreasonable detention violates the Fourth Amendment, we decline to extend the impact of that holding to require exclusion, after such a detention, of evidence acquired independently of the illegal arrest.

The exclusionary rule exacts a heavy penalty, and although its operation is justified, the exclusion of evidence should be for therapeutic reasons and should not be used as a punitive measure. The application of the exclusionary rule requires a commonsense appraisal of whether the suppression of the challenged evidence will remove in the future the motive for similar improper police conduct. In this analysis, it has never been enough to show that evidence must be suppressed simply because it was discovered subsequent to an illegal arrest; it must in addition be shown that the police exploited the illegal detention in such a way as to establish that it was the detention which produced the challenged statements. In a case such as this, where the trial court is satisfied on sufficient evidence that the required nexus between the detention and the statements is absent, there would be no deterrence and therefore no reason to invoke the exclusionary rule (cf. *Dunaway v. New York*, 442 U.S. 200, 218, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824, *supra*).

Accordingly, the order of the Appellate Division should be affirmed.

COOKE, C. J., and JASEN, GABRIELLI, JONES, FUCHSBERG and MEYER, JJ., concur.

Order affirmed.

421 N.E.2d 494
53 N.Y.2d 678

The PEOPLE of the State of New York, Respondent-Appellant,

v.

Richard P. LUCAS, Appellant-Respondent.

Court of Appeals of New York.

March 26, 1981.

Defendant was convicted in the County Court, Sullivan County, 95 Misc.2d 334, 406 N.Y.S.2d 1019, Louis B. Scheinman, J., of murder and other crimes, and he appealed. The Supreme Court, Appellate Division, Third Division, Third Department, 73 A.D.2d 699, 422 N.Y.S.2d 534, modified and affirmed, and cross appeals were taken. The Court of Appeals held that: (1) where defendant was in custody at time he made uncounselled, inculpatory statement while being transported from Florida to New York following an extradition proceeding, defendant's "indelible" right to counsel had attached and any waiver of that right made in absence of counsel would have to be deemed invalid; (2) where police officer, by engaging in discussion with defendant concerning crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked uncounselled, inculpatory statement from defend-

[illegible] was not "spontaneous" and should [illegible] from which People appealed recited that modification was made on the law and the facts and an examination of the Appellate Division opinion indicated that recitation in order was accurate, appellate court had no power to entertain People's appeal.

Reversed.

Jason, J., concurred with opinion.

1. Criminal Law ⇐412.2(5)

Where defendant was in custody at time he made uncounselled, inculpatory statement and had previously requested the assistance of an attorney, defendant's "indelible" right to counsel had attached and any waiver of that right made in absence of counsel would have to be deemed invalid.

2. Criminal Law ⇐412.1(4)

Where police officer, by engaging in discussion with defendant concerning crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked uncounselled, inculpatory statement from defendant, statement could not be considered "spontaneous" under any view of the facts, and should have been suppressed.

3. Criminal Law ⇐1024(1)

Where order from which People appealed recited that modification was made "on the law and the facts," and examination of the appellate division opinion indicated that recitation in order was accurate, appellate court had no power to entertain the People's appeal.

---

[1] Carl J. Silverstein, Monticello, for appellant.

Joseph Jaffe, Dist. Atty. (Stephen F. Lungen, Asst. Dist. Atty., of counsel), for respondent.

Robert Abrams, Atty. Gen. (Frederick R. Walsh and Shirley Adelson Siegel, Asst. Attys. Gen., of counsel), in his statutory capacity pursuant to section 71 of the Executive Law.

[1] ...ION OF THE COURT

MEMORANDUM.

Insofar as appealed from by defendant, the order of the Appellate Division, 73 A.D.2d 699, 422 N.Y.S.2d 534, should be reversed, the statements made by defendant on the airplane and the physical evidence seized in the motel room suppressed and the case remitted for further proceedings on the indictment. The cross appeal taken by the People should be dismissed.

Following a jury trial, defendant was convicted of murder in the second degree, kidnapping in the first degree and robbery in the first degree. The Appellate Division modified the judgment, 95 Misc.2d 334, 406 N.Y.S.2d 1019, on the law and the facts, by dismissing the kidnapping and robbery counts. We conclude that the remaining conviction for murder in the second degree must be reversed, because the trial court erroneously permitted the introduction of certain illegally obtained evidence.

[1] One of the more damaging items of evidence introduced at the trial was an uncounseled, inculpatory statement made by defendant while he was being transported from Florida to New York following an extradition proceeding. By the time the statement was made, a warrant for defendant's arrest on this charge had been issued by a Magistrate in New York. Moreover, it is undisputed that defendant was in custody at the time he made the statement and that he had previously requested the assistance of an attorney. Hence, defendant's "indelible" right to counsel had attached and any waiver of that right made in the absence of counsel would have to be deemed invalid (*People v. Samuels*, 49 N.Y.2d 218, 424 N.Y.S.2d 892, 400 N.E.2d 1344; *People v. Cunningham*, 49 N.Y.2d 203, 424 N.Y.S.2d 421, 400 N.E.2d 360; see *People v. Settles*, 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612). Nevertheless, the courts below concluded that the uncounseled statement in question need not be suppressed, since, in their view, it was made "voluntarily" and "spontaneously" (see *People v. Kaye*, 25

N.Y.2d 139, 303 N.Y.S.2d 41, 250 N.E.2d 329). This ... [illegible], is simply not supported by the record.

[2] According to the credited testimony of Officer Reidy, who was present when the statement was made, defendant initiated the conversation by asking the officer whether it was permissible to discuss the case. The officer replied in the affirmative, but reminded defendant that any statements he made could be used against him at trial. Defendant, in turn, acknowledged this admonition, but indicated that he wished to ask some questions about the pending charges. He then proceeded to ask Officer Reidy about the status of his case. Officer Reidy replied by informing him that the District Attorney had already obtained a 14-page statement from his alleged accomplice, Richard Graham, in which Graham acknowledged his own participation in the underlying robbery, but accused defendant of having been the sole perpetrator of the murder. Defendant responded immediately stating: "Well, I would like to talk to somebody about this. I might have been involved, but I didn't do—I didn't kill anybody".

This statement cannot be considered "spontaneous" under any view of the facts, since it was not a blurted-out admission, but was instead the product of an "extended discussion" between defendant and the police officer (*People v. Cunningham, supra*, at p. 210, n. 2, 424 N.Y.S.2d 421, 400 N.E.2d 360). It is not of controlling significance that the statement was "volunteered" in the sense that it was not made in response to direct interrogation, for, as we have previously observed, "the spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v. Maerling*, 46 N.Y.2d 289, 302 303, 413 N.Y.S.2d 316, 385 N.E.2d 1245). Here, there can be no doubt that the police officer, by engaging in the discussion with defendant concerning the crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked the uncounseled, inculpatory statement from the defendant. Accordingly, the statement made by defendant should have been suppressed.

[1] The trial court also erred in refusing to suppress certain items of physical evidence which were seized from defendant's Florida motel room immediately after his arrest. The seized items included: a brown briefcase purportedly owned by Graham, a black briefcase purportedly owned by defendant, a safe deposit box key for a box registered in defendant's name, receipts for American Express travelers' checks issued to defendant, a card showing defendant's and Graham's addresses and several Western Union receipts for money orders allegedly sent by defendant to friends in New York. As the People have candidly conceded, the warrantless search of defendant's motel room was "overbroad", extending far beyond the permissible scope of a search incident to a lawful arrest (see *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685). Hence, the evidence seized during the course of the search must be suppressed.* We note, however, that any information related to the suppressed physical evidence which the police legitimately obtained through independent sources may be used in evidence against defendant if the People decide to retry him on the remaining murder count.

Inasmuch as we have concluded that there must be a new trial because of the erroneous suppression rulings discussed above, we find it unnecessary to consider

* We reject defendant's additional argument that two safe deposit box keys for a box registered in Graham's name should have been suppressed. These keys were taken directly from a purse owned by Roberta Holmes, a friend who had accompanied the two men on their sojourn to Florida. Since Holmes was carrying the purse on her person at the time it was searched by the police officers, defendant has no standing to challenge the legality of the search, inasmuch as the safe deposit box in question was registered in Graham's name and there is no showing that Lucas had any legal interest therein, he had no standing to challenge the seizure (cf. *United States v. Lisk*, 522 F.2d 228 (7 Cir.), cert. den. 423 U.S. 1078, 96 S.Ct. 865, 47 L.Ed.2d 89).

the numerous claims made by defendant concerning a variety of supposed trial error. It should be noted, however, that we find no merit to defendant's contention that the entire indictment should have been dismissed at the close of the trial for lack of legally sufficient evidence. Nor can we agree that the indictment should have been dismissed on the ground that defendant was denied his constitutional right to a speedy trial, since, as the courts below found, the delays in the proceedings were attributable, for the most part, to defendant's own actions.

[3] Finally, we hold that the People's cross appeal from so much of the Appellate Division order as dismissed the kidnapping and robbery counts must be dismissed. The order from which the People appeal recites that the modification was made "on the law and the facts", and an examination of the Appellate Division opinion indicates that the recitation in the order is accurate. Thus, we have no power to entertain the People's appeal (CPL 450.90, subd. 2, par. [a]).

JASEN, Judge (concurring).

I agree with the majority that defendant's inculpatory statement to Officer Reidy was not "spontaneous" as a matter of law. I disagree, however, with the standard employed by the majority in reaching this conclusion and, therefore, am unable to join in their opinion.

The majority, adopting language used by this court in *People v. Maerling*, 46 N.Y.2d 289, 302–303, 413 N.Y.S.2d 316, 385 N.E.2d 1245), states that spontaneity must "be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed." While I have no quarrel with this general proposition, I do not believe that it states the appropriate standard to applied in determining whether or not a statement was truly spontaneous. In my view, the quoted language from *People v. Maerling* was meant merely to illustrate instances of nonspontaneous declarations and was not intended to be a pronouncement of the legal test to be utilized by a suppression court confronted with the task of determining whether a statement was spontaneous when made.

More recently, in *People v. Lynes*, 49 N.Y.2d 286, 425 N.Y.S.2d 295, 401 N.E.2d 405, this court had the opportunity again to address the question whether an uncounseled statement was truly spontaneous. In *Lynes*, we stated that the test to be employed by a suppression court in such situations is "whether the defendant's statement can be said to have been triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant". (*People v. Lynes, supra*, at p. 295, 425 N.Y.S.2d 295, 401 N.E.2d 405.) Rather than attempting to pigeonhole defendant's statement into one of the categories delineated in *People v. Maerling*, the present case should be measured under the more appropriate *Lynes* standard.

Applying the test in *People v. Lynes*, there can be no doubt that defendant's inculpatory statement was not spontaneous. Indeed, it was only after the extended discussion between Officer Reidy and defendant, in which Reidy informed defendant of the current status of the charges pending against him and of his alleged accomplice's statement, that defendant came forth with the inculpatory statement. Under any view of the facts, defendant's statement can only have been the result of this ongoing conversation with Officer Reidy "which should reasonably have been anticipated to evoke a declaration from the defendant." (*People v. Lynes, supra*, at p. 295, 425 N.Y.S.2d 295, 401 N.E.2d 405.) Thus, as a matter of law, this uncounseled statement was not spontaneous and should have been suppressed.

COOKE, C. J., and GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

JASEN, J., concurs in a concurring opinion.

On defendant's appeal: Order reversed, statement made by defendant on the airplane and physical evidence seized in the motel room suppressed and the case remitted to Sullivan County Court for further proceedings on the indictment.

On People's appeal: Appeal dismissed.

421 N.E.2d 498
53 N.Y.2d 687

Arthur PASHCOW et al., Doing Business as Town Realty Company (Dix Hills Company) et al., Appellants,

v.

TOWN OF BABYLON, Respondent.

Court of Appeals of New York.

March 31, 1981.

Town appealed from order and judgment of the Supreme Court, Special Term, Suffolk County, John G. McCarthy, J., which granted summary judgment to plaintiffs, declaring local ordinance unconstitutional. The Supreme Court, Appellate Division, Second Judicial Department, 78 A.D.2d 694, 434 N.Y.S.2d 663, reversed, on the law, and plaintiffs appealed. The Court of Appeals held that in view of fact that local ordinance requires consent or a warrant for an administrative search except in emergency situations, such ordinance is not unconstitutional on its face.

Affirmed.

Municipal Corporations ⇐594(1)

In view of fact that local ordinance requires consent or a warrant for an administrative search except in emergency situations, such ordinance is not unconstitutional on its face.

Alan Manning Miller, Cork Place, for appellant.

Joseph F. Klein, Town Atty., Lendenhurst, (Patrick J. Barton, Elmira, of counsel), for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 78 A.D.2d 694, 434 N.Y.S.2d 663, should be affirmed, with costs.

In this action for a declaratory judgment is cannot be said that the ordinance of the Town of Babylon is unconstitutional on its face, for it does require consent or a warrant for an administrative search except in emergency situations. The court may not speculate, at this juncture, concerning the possible application of the ordinance in an unconstitutional manner, but we note that an owner's ability to rent his premises may not be conditioned upon his consent to a warrantless inspection (see *Sokolin v. Village of Freeport*, 52 N.Y.2d 341, 438 N.Y.S.2d 257, 420 N.E.2d 55).

COOKE, C. J., and JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

Order affirmed, with costs, in a memorandum.

421 N.E.2d 498
53 N.Y.2d 694

In the Matter of the Arbitration between Doris ALLEN, Appellant,

and

NEW YORK STATE et al., Respondents.

Civil Service Employees Association, Inc., as Party in Interest.

Court of Appeals of New York.

March 31, 1981.

State appealed from an order of the Supreme Court, Special Term, Richmond

APPENDIX D

The PEOPLE of the State of New York
v.
Richard B. GRAHAM and Richard P. Lucas, Defendants.

County Court, Sullivan County.

June 16, 1977.

In prosecution for murder in the second degree, kidnapping, and robbery, defendants filed motion to suppress certain tangible evidence seized pursuant to search warrants and also warrantless arrest and to suppress certain confessions or admissions. The County Court, County of Sullivan, Louis B. Scheinman, J., held that (1) record established that defendant knowingly, intelligently and voluntarily waived his right to remain silent and to counsel when defendant confessed, and (2) New York had greatest interest in case with respect to New Jersey searches and Florida arrest, searches, and confessions or admissions, and thus law of New York would be applied in deciding motions to suppress physical evidence.

Motions denied.

1. Criminal Law ⇐391.6(4)

Clear and convincing evidence test applied on motion to suppress evidence other than confession.

2. Criminal Law ⇐531(3)

Reasonable doubt test applied with respect to evidence concerning voluntariness of confession.

3. Criminal Law ⇐531(3)

In prosecution for murder in the second degree, kidnapping, and robbery, record established beyond a reasonable doubt that defendant knowingly, intelligently and voluntarily waived his right to remain silent and to counsel when he confessed.

4. Action ⇐17

Where evidence is legally obtained, in violation of local law, but not rising to constitutional proportions, forum court can select law to be applied.

5. Action ⇐17

Where alleged murder, kidnapping and robbery occurred in New York, where New York citizen was victim, where all defendants were residents of New York and almost all witnesses in New York prosecution were New York residents, and where police activity in New Jersey and Florida was mainly conducted by New York state police officers with assistance of local police officers and facilities, state of New York had greatest interest in case with respect to New Jersey searches and Florida arrests, searches, and confessions or admissions, and thus New York law would be applied in deciding defendants' motions to suppress physical evidence.

Emanuel Gellman, Dist. Atty. of Sullivan County, Monticello, by Stephen F. Langen, Asst. Dist. Atty., of counsel.

Stephen L. Oppenheim, Monticello, for defendant Richard B. Graham.

Legal Aid Society of Sullivan County by Michael Zager, Monticello, of counsel, for defendant Richard P. Lucas.

LOUIS B. SCHEINMAN, Judge.

These are motions by defendants to suppress certain tangible evidence seized pursuant to search warrants and also a warrantless arrest, and to suppress certain confessions or admissions.

The indictment charges defendants with the crimes of murder in the second degree, kidnapping and robbery.

Although the cases have been severed for trial, these hearings were combined and held jointly, pursuant to stipulation.

[1, 2] This opinion will set forth the facts found by this Court in making its determination (C.P.L. 710.60 subd. 4). Although different standards of proof are required on the several types of suppression sought (*People v. Pobliner*, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637, clear and convincing evidence test on motion to suppress evidence other than a confession, and *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179, beyond a reasonable doubt test as to voluntariness of a confession), this Court has found all facts mentioned beyond a reasonable doubt.

At about midnight of October 13, 1975, one Craig R. Mitton was reported missing by his wife. It was learned by the New York State Police that he had been employed by the Mid-Valley Petroleum Corporation of Newburgh, New York, as a route sales supervisor, whose duties included collecting money from gas stations operated by his employer and depositing same each afternoon at about 4:00 P.M. in a night depository at a certain local branch bank.

The police learned from company officials that on said date of October 13 he had made up the deposit, which included cash in four bags, and left for the nearby bank at a time which was between 4:00 o'clock, and 4:45 o'clock P.M. on that date. He was not seen or heard from thereafter, and the said deposit in excess of $25,000 had not been made.

On October 15, 1975, his body was found in Sullivan County, with clear evidence that he had been the victim of foul play, his body evidencing 3 bullet holes, 2 in the head and 1 in the back, and a blow to his head.

The vehicle used by the deceased, which belonged to his employer, was found abandoned in another location, with a change box.

The police learned from one Gloria Baker, who personally knew defendant Lucas, that at about 4 o'clock P.M. on October 13, she had seen defendant Lucas sitting in a Lincoln automobile with another unidentified person at the branch bank where the deceased was to have made the deposit. Gloria Baker also advised the police that defendant Lucas had cohabited for a time with one Madeline Mead, employed at the Middlebope Service Station, and that defendant Graham had also been employed at said service station. The police also learned from a Julia Tibby, that her sister, Sherryl Kilb had gone on a small vacation with defendant Lucas, another girl, Birdie and another fellow, "Richie".

The police also learned from company officials that defendant Graham had held the same position with Mid-Valley Petroleum Corporation as the deceased, but had been fired about 2 weeks earlier for taking home a deposit of approximately $40,000 without depositing same in the night depository at the same bank branch.

Julia Tibby had also told the police that Graham possessed a handgun. Further inquiry disclosed that he had no permit for same.

The police were also advised that defendant Graham wore a gun holster on his person.

The police also learned that the defendants were friends, and that they and the girls Sherryl Kilb and Roberta Graham had left the area in the evening or night of October 13.

One Georgia Shorey had also advised the police that Lucas, Sherryl Kilb, Graham and one Roberta Holmes were together in the New York City area, and that Georgia Shorey had a money-gram waiting for her at the Newburgh Western Union office, subsequently learned to be in the sum of $100, from one of the defendants in Florida.

Gloria Baker had also advised the police that about a week earlier, Lucas had called her to obtain the keys to the safe at the Middlebope Service Station, as he was in need of money and that no one would be hurt. She refused, and subsequently she received a telephone call from Lucas telling her that if she told anyone of their conversation he would shoot her. On that same evening the said gas station was burglarized and money and cigarettes stolen.

Subsequently, the police learned that Georgia Shorey received a telephone call from Lucas advising her not to reveal the whereabouts of the two defendants and the girls to anyone.

The police launched a search for defendants and checked airports in the New York metropolitan area and located the 1974 Lincoln at the Gateway Motel in Newark, New

Jersey, near Newark Airport, during the early morning hours of October 17.

The Motor Vehicle Bureau confirmed that the car belonged to Lucas. A bartender at the motel identified a photograph of Lucas, and advised the police that he had been tipped with a paper bag containing about $8.00 in change, there having been change missing from the change box found in the company car driven by the deceased victim.

The police also learned that defendant Lucas had an extensive arrest record with one or two convictions. The crimes mentioned on his record included crimes of violence and the use of firearms.

A check made with the Motor Vehicle Bureau revealed that the Lincoln automobile owned by Lucas was a 1974 model, and its license plates number, which matched the plates on the car.

Following the location of the automobile, the same was placed under discreet surveillance by the New York State Police, and that afternoon other New York officers arrived. Subsequently, at about 4:00 P.M. on the 17th, Investigators Chandler and Owens, together with a member of the local prosecutor's office, appeared before a Superior Court judge of the State of New Jersey and gave testimony under oath before said judge in their application for a search warrant of the automobile. A transcript of said proceedings was received in evidence, showing that there was preliminarily a discussion with the Court, after which the Court placed the oral application on the record, the Court capsulizing or summarizing the facts giving rise to probable cause on the record.

An issue was raised at the hearing as to whether the officers were sworn during the recorded phase of the record, which contains most of the facts abovementioned, or, as Investigator Chandler testified, when the initial discussion with the Court commenced off the record. Defense counsel were given the opportunity to confer with the New Jersey Court, and to call the judge as a witness to controvert the testimony of Investigator Chandler. Although one of the defendant's attorneys conferred with said judge he was not called.

This Court finds beyond a reasonable doubt that all of the foregoing facts were laid before the New Jersey Court, under oath, which, in the transcript in evidence held "I am satisfied that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that the automobile sought to be searched and seized has been sufficiently established as the connecting link between the commission of the homicide and evidence of the crime," and signed the search warrant (People's Exhibit 24A, p. 11).

A search of the car was then conducted by a New Jersey police officer with 2 New York State Police officers in attendance and assisting.

It should be noted, parenthetically, that the reason the application for the search warrant was made by sworn testimony rather than by affidavit is recited in the New Jersey transcript in evidence, i. e., that the application was made on a Friday, at about 4:00 o'clock P.M., and that there was, therefore, insufficient time to prepare papers for the Newark prosecutor's office and the probable unavailability of a judge on the weekend.

The search of the Lucas' vehicle yielded miscellaneous papers belonging to defendants Graham and Lucas and a Debra Kilb, a rope, a rifle, shotgun shells, a hair from the trunk area, and other items of property.

All items of personal property found in the car, and the car itself, were inventoried and, with the approval of the New Jersey Court, removed to New York State Police headquarters in New York.

A check with the airlines in Newark revealed that a "Mr. and Mrs. Richard Lucas" and a "Mr. and Mrs. Richard Graham" had departed on a 9:05 P.M. flight from Newark to Fort Lauderdale, Florida, on October 14. The police also learned that defendants had a Doberman Pincer dog with them.

A number of New York State Police officers flew to Fort Lauderdale on the night

of October 17. The following day, October 18, the police learned from the Western Union office in Florida from which moneygrams had been sent to the Newburgh, N.Y. area the address of a motel in Dania, Florida, which defendants had given to Western Union. It was further learned that Lucas and Graham had sent an additional moneygram each to the Newburgh, N.Y. area.

It was also learned that defendants had registered at this motel under their own names in 2 rooms, but had given false addresses, and had also rented a car and motorcycle, that they had a large amount of money with them in travelers checks.

On the 18th, the New York State Police officers met with officers of the Broward County Sheriff's department and a member of the Florida Division of Law Enforcement, filled them in on all of the foregoing facts, including those earlier mentioned herein in dealing with probable cause for the automobile search warrant obtained in New Jersey, and a surveillance was maintained of the 2 motel rooms occupied by defendants.

The Florida police requested a teletype message from New York, describing defendants as fugitives. The New York police made such request by telephone, and also for an arrest warrant to be obtained in New York. The teletype message directing the arrest was received in Florida before 8:00 P.M. on the 18th. However it appears that although the officer in charge of the investigation in New York requested that an arrest warrant be obtained here, the same was not obtained until October 20. However, the officers believed that the warrant had been obtained and was in existence prior to the arrests.

Defendants and the 2 women with them returned to the motel rooms at 6:40 A.M. on the 19th. Believing them to be armed and with a vicious dog, the police waited until 8:00 A.M. when without warning or notice, the police officers simultaneously, with the use of a passkey to one room, and through an unlocked door to an adjoining room, entered both rooms with drawn guns and one officer with a towel wrapped around his arm as a precaution against the dog, and arrested the defendants, who, together with the 2 women, were taken to the Sheriff's Department in Fort Lauderdale, where they arrived at 9:00 A.M. There was no dog in the room, it having been placed with a veterinarian a day or 2 earlier, nor any guns found.

Defendant Graham was given his full "*Miranda*" warnings 4 times, once in the motel room, upon arrival at the Sheriff's Department, before making his confession, and at the beginning of his confession, which was tape recorded. On 2 occasions, at 9:00 o'clock and 11:00 A.M., he signed written acknowledgments of having received these warnings and, specifically waived counsel, as he also did orally, at the commencement of his tape recorded confession.

[3] A typewritten transcript of Graham's confession was received in evidence at the hearing, (which Graham subsequently refused to sign) and this Court listened, in camera, to the tape recording of the confession (by stipulation). This Court is satisfied beyond a reasonable doubt that Graham knowingly, intelligently and voluntarily waived his right to remain silent and to counsel.

The confession, which took 45 minutes to tape, was completed orally at 11:45 (the same day as the arrest) and in brief substance sets forth the following:

Lucas, who was his friend and drinking companion, and familiar with handling of the moneys at Mid-Valley Petroleum, suggested the robbery of Craig Mitton to Graham who agreed to participate. On October 13, they waited for the victim at the branch bank, held him up, Lucas ordering Mitton into Lucas' car. Graham following in Mitton's station wagon. They drove to a lonely country area where they abandoned Mitton's car, ordering Mitton into the trunk of the Lincoln. They then drove to another isolated area, Lucas and Graham discussing the fact that Mitton knew Graham as ex-employees of Mid-Valley, Lucas insisting, therefore, that they had to "blow him

away". When the car was stopped, Graham opened the trunk, Mitton was ordered out, Graham hit him over the head knocking him down with a club, and while Mitton was on the ground, Lucas shot him in the head and back area several times until his gun jammed, and then left the body of the victim there, left the murder scene, picked up the 2 women, disposed of the handgun used in the killing in a stream in New Jersey, etc. He told of taking the money, about $26,000, including change from the change box, he and Lucas placing most of the money in safety deposit boxes in 2 banks in Newark, purchasing travelers checks, and leaving for Florida. He exonerated the 2 women from any implication in or knowledge of said crimes.

Lucas refused to make any statements to the police.

On Oct. 21, both men were taken before a Court in Florida, and waived extradition to New York, Lucas after conferring with counsel which he had requested.

It should be mentioned here that Graham testified in his own behalf at the hearing, and claimed that he had been beaten by an officer Reidy of the New York State Police about 10:00 A.M. while in the Sheriff's office in Florida and his confession thus coerced. This Court is convinced that said claim is a pure fabrication, as Investigator Reidy had little or no contact with him subsequent to the arrest and prior to the confession, Reidy having remained at the motel after the arrests and removal of defendants assisting Florida Police in inventorying the property found there. Also, Graham claimed marks on his torso from the alleged beating, having evidently forgotten when he testified that when processed at the N.Y. State Police barracks upon his return he had been photographed, front and rear, with absolutely no evidence of same, nor had he complained of any mistreatment to any other police officer nor to the Florida Court when he was brought before said court.

The hearings also covered an inculpatory statement made by Lucas on the airplane trip back to New York. It is clear, even from the testimony of Lucas at the hearing, that he was not mistreated in any way, and that his remarks to the police officer seated next to him on the airplane were voluntary, unsolicited, and after being warned before he spoke that his statement could be used against him. Nor was such statement the result of any interrogation. Lucas merely denied making the statement, and whether he did or did not would be for a trial jury to decide.

An issue developed regarding a cowboy type hat worn by Lucas. This hat had been returned to Lucas in Florida, and he wore it on the trip back to New York. However, after processing at the state police barracks, he inadvertently left it there. The police, then realizing it had evidentiary value, kept it as evidence. Lucas also seeks its suppression.

Based upon the Graham confession and its mention of the hiding of the money proceeds in safety deposit boxes in Newark, the police obtained the names of the banks and the numbers of the accounts, and applied by written sworn applications to the same New Jersey court for search warrants on these 2 banks and respective safety deposit boxes, obtained the search warrants, and searched and seized the boxes and bank records pursuant thereto.

Returns on all search warrants were duly furnished to the New Jersey Court, and upon order of said Court, all seized property was returned to New York State (including the car and its contents).

Lucas's safety deposit box yielded $10,342.00. Graham's safety deposit box yielded $10,893.00.

It should be noted here that defendants called Roberta Holmes and Sherryl Kilb as their witnesses. The women testified that they were taken also to the Sheriff's Department in Florida, were given *Miranda* warnings and both made statements to the police. They were well treated, taken back to the motel, the police making the arrangements for their return to New York and transportation to their respective homes. Graham had given Roberta Holmes the keys

to the safety deposit box which she kept in her purse, and she had no objection to the police taking the keys. These keys were of the safety deposit box rented by Graham. Lucas' keys to the safety deposit box rented by him were amongst the property removed from his room.

An issue also developed at the hearing as to whether the 2 women were arrested in the motel rooms. This Court finds from the evidence that they were, in that their movements were restrained, they were taken to the Sheriff's office and not advised they were free to leave until after they were interrogated and after Graham's confession when the police were satisfied that they had no knowledge of the crimes.

This Court further finds that due to the foregoing, and the police initially not expecting the women to be returned to the motel, that all the contents of the rooms occupied by the defendants were inventoried and removed to the Florida sheriff's office for safekeeping, and, after certain belongings were returned to the women upon their release that day, all the rest of the property was turned over to the New York State Police for return to New York.

On October 20, while the 1974 Lincoln was still in New Jersey, the trunk interior was dusted for fingerprints, and fingerprints of the deceased, Craig Mitton, found.

Defendants seek suppression of all items of evidence seized in New Jersey, claiming absence of probable cause for the search warrants issued by the New Jersey Court, and suppression of all evidence obtained in Florida by reason of the claimed illegality of the arrests there, including suppression of the confession by Graham as a result of said arrest, and of the inculpatory statement made by Lucas. They also seek suppression of the fingerprints found in the trunk of the car, of Lucas' hat, etc. Miscellaneous other grounds are suggested by defendants for the suppression of all the foregoing.

Defense counsel argued strenuously that, with respect to the New Jersey searches, the Florida warrantless arrest, search, seizure and confessions or admissions, that New Jersey and Florida laws, respectively, apply. They maintain that under the laws of such States, the evidence obtained in said States should be suppressed pursuant to applicable case and/or statutory law in said States, respectively.

This Court is by no means convinced that New Jersey or Florida laws differ significantly in their application to the facts here from New York law. No expert testimony was offered with respect to the laws of such States, although citations of New Jersey and Florida cases and Florida statutes were made in their briefs.

Thus, a threshold question must be determined by this Court, i.e. whether the laws of such States are to be applied with respect to the evidence sought to be suppressed obtained in such States, or whether our own laws govern with respect to the admissibility of such evidence.

Counsel have cited no cases bearing upon this conflict of laws question, and, indeed, this Court has not been able to unearth any New York case dealing with this conflict of laws problem in the criminal law area.

Turning to other jurisdictions faced with this question, there are cases persuasive, however, on this point. In *Burge v. State*, Tex.Cr.App., 443 S.W.2d 720 (1969) the defendant was convicted of burglary and attempted rape in Texas. He was a resident of the State of Oklahoma, and while he was in Texas custody, his wife, at his Oklahoma residence, permitted police officers to search their home in Oklahoma without a warrant. Contrary to Texas law, Oklahoma grants to each spouse a personal right to demand a search warrant for the search of the marital residence. Upon said search which was made without the consent of the defendant, incriminating evidence was found and admitted at the Texas trial.

The Texas Court found the question to be evidentiary and procedural in nature, and thus governed by the law of the forum, and affirmed the conviction.

In *People v. Saiken*, 49 Ill.2d 501, 275 N.E.2d 381 (1971), the Supreme Court of Illinois, faced with the same problem,

as to deprive petitioner of a fair trial and due process of law.

The prosecutor began laying the foundation of his diatribe against the petitioner by stating:

> "Remember, he had six years to figure out what he was going to tell you now. For six years Mr. Lucas has been planning on what he was going to say to you on Friday and Monday." (T-1316).

The prosecutor then went on to say that the case was important to the State of New york, thereby improperly using the weight and prestige of his office to influence the jury (T-1349), and the Court further improperly bolstered the prosecutor's remarks (T-1349-1350).

Four pages of transcript later, the prosecutor says, among other things, the following:

> "The defense does something <u>that is</u>, <u>to me</u> incredible..."
> "They have the <u>audacity</u> to ask you ...." (Emphasis supplied)

and four pages later (T-1358-59);

> "The most incredible witness in the whole trial testified. The name is Richard Lucas seated right here....."

The prosecutor used the word audacity three times in one paragraph in describing petitioner's argument in summation (T-1354-55), and the prosecutor continually called petitioner a liar; that he had the greatest motive to lie, and that he had six years to plan and rehearse his testimony. (T-1358). (The six year delay of waiting for trial and appeal was not the fault of petitioner).

The the prosecutor said (T-1358-59):

> "And he sat on this witness stand for two hours and he told you a story that went up the peaks and down the valleys and he made all the curves. It was the neatest story for all the damaging evidence you can possibly imagine, of course, after six years, he should have made it a little neater; or, should I say, he made it too neat."

Then a few sentences later at (T-1360):

> "Then he concocted this drug story, a story of a drug deal between Graham and Mitton and other people, and I will tell you there is not a shred of evidence to back it up and no way you can consider it in the jury room."
>
> "And he tells this fairy tale" (T-1361).

The prosecutor makes up a "lie column" and places all witnesses in

that column and says that petitioner claims to be the only one telling the truth (T-1313).

Then,

> "He had no choice but to admit that fact in the great tale and story that he told," (T-1315).
>
> "With all the garbage you heard, pardon my language, the garbage of his having money to spend...." (T-1315).

Such invective is improper, especially when used by one bearing the mantle of District Attorney, and denied the petitioner a fair trial.

The words of Judge Friendly in <u>United States v. Fernandez</u>, 480 F.2d 726, 741, 742 n. 23 (2d Cir 1973) are applicable to this case:

> "In light of our holding in Part III, we are not obliged to pass on the defense's claim of prosecutorial misconduct. However, the summation by the Assistant who tried the case surely went to the verge and perhaps beyond it, as this court warned only last year, the use of first-name epithets at a defendant that might be commonplace in a second-rate movie or television script' is beneath the dignity of the United States Attorney's Office and of the United States as a sovereign, <u>United States v. Benter</u>, 457 F.2d 1174, 1177 (2d Cir. 1972), notwithstanding the sincerity of the prosecutor's belief that the defendant is guilty or that perjury has been committed."

The prosecutor also appealed to the emotions of the jury by referring to the victim's widow:

> "Craig Mitton is dead and Maureen Mitton is without her husband and justice has to be done and is going to be done in this courtroom. That I can tell (T-1316-1317).

A chronological list of the instances where the prosecutor alleged that petitioner lied illustrates why petitioner did not receive a fair trial:

Page 1358.

1. The most incredible witness in this whole trial testified.
2. This is the person who has the greatest motive to lie.

Page 1359.

3. The only thing he denied, he has to lie about are a few things.
4. Lucas had to lie about the telephone call to Jeanie Baker,
5. He had to lie about it because it shows motive.
6. He has to lie about the drug deal.
7. He has to lie about that.

Page 1360. 8. He has to lie about being parked at the bank.

9. And he has to lie about going to Connecticut.

10. And he has to lie about getting half of the money.

11. Then he concocted this drug story.

Page 1361. 12. He goes on with that story and tells this fairy tale.

Page 1362. 13. The question cannot be answered logically because he lied.

14. And you can't give a logical answer to a lie.

Page 1364. 15. Mr. Lucas' testimony should be totally disregarded because it is an absolute lie.

Page 1370. 16. And we absolutely know because Mr. Lucas' testimony is a lie.

The prosecutor in closing, went into an emotional argument that was irrelevant, immaterial and as prejudicial as he could make it. The prosecutor commented on where the petitioner and others were and what they were doing while the victim was supposedly bleeding to death or dead. One such quote is typical of three pages of transcript:

> "And at about 7:30 or 8:00 that evening, when Graham and Lucas were together counting the blood money, where was Craig Mitton? He was still lying face down at the Brook Haven Bungalow Colony and he was still bleeding to death." (T-1381).

Even if the above were true, it did not have any bearing on the question of whether petitioner was a principle to the murder. Three full pages of transcript alluding to the acts of petitioner, and including the suffering or death of the victim, in the manner of the argument, has no probative value and was meant only to inflame the passions of the jurors. It was the basest sort of summation, and should be condemned in no uncertain terms.

The end of that diatribe was:

> "(Craig Mitton) screaming out for you to do him justice." (T-1383).

To quote Mr. Justice Sutherland's classic statement of the prosecutor's role:

> "(He) is the representative not of an ordinary party to a controversy, but of a sovereinty whose obligation to govern impartially is as compelling as it its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. he may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not al liberty to strike foul one. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 2d 1314 (1935)

A wrongful conviction of petitioner occurred as a result of the foul blows struck by the prosecutor in his case, and this Court should grant certiorari and use this case to make clear to the State of New York and other jurisdictions, that convictions obtained by these methods and in violation of due process of law, are improper and will not be tolerated.

> This Court should review the decision below because the Appellate Division has upheld the introduction at petitioner's trial of prejudicial evidence not connected to the crime, thereby depriving petitioner of a fair trial and due process of law.

As part of the multitude of items seized from petitioner's vehicle pursuant to the search of October 17, 1975, the police seized a shotgun, shells and rope. These items were not set forth in the warrant. There was no issue but that the shotgun was legally owned and registered in petitioner's name).

Petitioner, in his Omnibus Motion, prior to the second trial, asked for suppression of the shotgun. The trial Court's decision stated:

> SUPPRESSION OF SHOTGUN
> "Denied, the discovery of fingerprints of deceased in defendant's automobile trunk may allow the jury to conclude his presence therein was coerced, and a handy means of coercion used, the jury may find, was the shotgun." (Appendix I).

The shotgun, shells and rope were marked for identification during the trial (T-570) and later, admitted in evidence (T-829(. There was objection to each on the grounds of materiality (T-628, 630) and, at first, the Court sustained the objections. However, over objection, they were later admitted in evidence even though no connection had been made between those items and the alleged crimes (T-829-831).

It was admitted that the victim could not have been shot with this gun (T-700), and there was no evidence produced during the trial that

either the rope or the gun had been used in the crime.

This error was greatly enhanced, because the Court, during its charge, indicated that petitioner was entitled to have an affirmative defense under Section 125.25 subd. 3 of the New York Penal Law charged to the jury. Part of that charge was (T-1414):

> "(b) was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury...."

also, (T-1415) :

> "Therefore, the affirmative defense is established by a preponderence of the evidence when the proof...that the defendant...was not armed..."

The shotgun, having been allowed in evidence over objection, created a strong possibility that the one item alone was considered by the jury as negating petitioner's affirmative defense.

Even if the language in the search warrant allowing the police to search for and seize "other evidence of a homicide...." was not unconstitutionally overbroad, thereby making it a general warrant, the shotgun, shell and rope should have been suppressed because they were not "other evidence of a homicide".

The introduction of those items at petitioner's trial improperly influenced the jury and denied petitioner a fair trial and due process of law.

> This Court should review the decision below because the lower courts have failed to comply with the mandates of this Court that guilt must be proven beyond a reasonable doubt.

It was obvious from the wounds to the victim that they were intentionally inflicted upon him, but taking the evidence in a light most favorable to the People, there was no evidence as to who it was that inflicted those wounds.

The only circumstantial evidence presented against petitioner was that he had been seen at a bank at 4:30 p.m. and that the victim had left for that bank at 4:30 - 4:45 p.m., that petitioner was with Graham at 8:00 p.m. with what was presumed to be the money that the victim had previously possessed, and the victim's fingerprints had been found on the inside trunk lid of petitioner's automobile.

The above facts are susceptable to so many innocent explanations

that it cannot be said that they are only consistent with petitioner being present when the victim was killed.

The foregoing, of course, was the evidence at the end of the People's case, before petitioner testified. The defense made the appropriate motions at the end of the People's case (T-873-875).

As to Intentional Murder, there was absolutely no evidence, circumstantial or otherwise, to support such a charge against petitioner, Whoever killed the victim, their intent cannot be imputed to the petitioner. Without proof of any sort that petitioner either fired the gun or that he shared the intent of another to fire the gun, there cannot be a conviction for intentional murder.

Other than the perjurious testimony by BCI Officer Reidy, that petitioner had admitted that "he might have been there" (see Point 3, Supra), there was absolutely no evidence to show that petitioner had been anywhere near the scene of the murder.

Also, petitioner had never been seen with a gun. Witnesses called by the defense and prosecution testified to seeing Graham with a holster strapped to his leg (T-401, 507, 879, 1053-1054, 1187). People's witness Roberta Holmes saw a gun in a brown bag placed in her closet by Graham (T-359-360). Bank employee Arnold saw a gun in Graham's bag when he was at the bank on October 14, 1975. (T-544). Prosecution witness Kilb, who lived with petitioner on and off never saw petitioner with a gun (T-497-498). The only firearm attributed to petitioner was an over/under rifle/shotgun which the State Police testified was not used in the killing (T-700). As a matter of fact, the only gun identified by anyone as being possessed by Graham did not match the type of gun used in the killing (T-544, 554-557, 1054).

It therefore cannot be inferred as to who fired the gun; whether it was a third person, Graham or petitioner. Assuming there could be any inference as between Graham and petitioner, then the inference would be more reasonable that it was Graham.

The People failed to prove a specific intent on the part of petitioner to murder, and filed to show a specific intent of Graham to commit murder which was shared by petitioner and therefore,

petitioner's guilt was not proven beyond a reasonable doubt.

Similarly, based on the Appellated Court's decision which dismissed the kidnapping count of the indictment (Appendix B), the only way that petitioner could be convicted of Felony Murder is if the jury could have found, on the evidence, proof of a robbery, by petitioner, as principle or accessory beyond a reasonable doubt; but the trial court refused to charge this although requested.

There was no intent or shared intent shown on the part of petitioner. He had part of the money, but that may show an intent to be a possessor of stolen property, rather than a robber or accomplice to a robbery. People v. Batten, 40 A.D.2d 549, affirmed 31 N.Y.2d 737. In fact, there is no evidence, even circumstantially, to show that unambiguously, Graham did not receive the money from Mitton or others voluntarily turning over the money, to Graham or another.

The United States Constitution prohibits the criminal conviction of any person except upon proof of guilty beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed 2d 368, and the test on appeal is not whether there was any evidence to support a conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonbale doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560.

Petitioner respectfully submits that the evidence in his case does not meet that standard, and that the Courts below upheld his conviction based on a finding of a "mere modicum" of evidence. Jacobellis v. Ohio, 378 U.S. 184, 202, 84 S. Ct. 1676, 12 L.Ed.2d 793, rather than on a finding of proof of guilty beyond a reasonable doubt.

Therefore, this Court should grant certiorari in this case and intervene on petitioner's behalf and on behalf of other similarly situated defendants, to make clear that criminal convictions can only be upheld if they are obtained by proof of guilt beyond a reasonable doubt.

11. This Court should review the decision below to decide whether a sentencing Court must take rehabilitation of the offender into consideration when the state's Penal Law mandates that it be considered.

The trial judge, at the time of sentencing of petitioner stated: (S-8)

> "To my mind, the punishment here should be based on retribution rather than any thought of rehabilitation rather than any thought of rehabilitation of the terribly, terribly aggravated nature of this crime. That's my thinking on the subject."

The judge went on to say:

> "...this is the typical case that would warrant capital punishment and you know, when you have capital punishment you have very little opportunity for rehabilitation."

Three letters were presented from officials of the New York correctional system indicating petitioner's rehabilitation (S-14).

Petitioner's attorney's allocation requested that the Court take cognizance of petitioner's rehabilitation (S-14).

The petitioner himself allocated and asked for rehabilitation consideration in being sentenced (S-17).

The trial Court erred when it stated that it didn't believe there was pennance and remorse (S-17). It is difficult for an innocent man who has been wrongfully convicted to say he is sorry for something he did not do. But petitioner did indicate his remorse for anything he may have done (S-16).

The refusal of the Court to consider rehabilitation violated Section 1.05 subd. 6 of the New York Penal Law, (see also People v. Burgh, 89 A.D.2d 672, and People v. Farrar, 52 N.Y.2d 302, 305), and deprived petitioner of fundamental fairness, as required by the Due Process clauses of the 5th and 14th Amendments to the United States Constitution. Such is also a violation of the 8th Amendment to the United States Constitution in that, unless rehabilitation is considered, there is cruel and unusual punishment. Refusal to consider rehabilitation, as the Court did so in petitioner's case, is also a denial of equal protection of the law in violation of the 14th Amendment to the United States Constitution and calls for the intervention of his Court on behalf of petitioner and other similarly situated defendants.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

DATED: July 12, 1985

Richard P. Lucas

Richard P. Lucas, 78-A-2362
Petitioner pro se
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

APPENDIX A

vehicle ... motorist (Insurance Law, § 5202, ... par. 1). The Insurance Law affords protection to "insured" and "qualified" individuals (Insurance Law, § 5201 *et seq.*). However, these two categories are mutually exclusive (*Matter of Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6, 10, 342 N.Y.S.2d 845, 295 N.E.2d 647; *Matter of Wallace v. MVAIC, supra*, 25 N.Y.2d pp. 386–387). An "insured" must recover under the uninsured motorist clause required in all insurance policies (Insurance Law, § 167, subd. 2-a) or, lacking such status, resort to a suit against MVAIC. An "insured" includes anyone who is protected by the uninsured motorist endorsement which is required in all policies issued in New York (Insurance Law, § 5202, subd. [A], par. 9; § 167, subd. 2-a). If the endorsement is not expressly included, it will be implied (Insurance Law, § 167, subd. 2-a). Uninsured motorist endorsements cover, *inter alia*, the named insured and, while residents of the same household, his spouse and the relatives of either (30 N.YJur., Insurance, § 1246, p. 688).

[6–8] Since decedent lived in the same house with his parents and his parents had an insurance policy with the required uninsured motorist endorsement, it appears that decedent was an "insured" and, therefore, not entitled to recover against MVAIC. Petitioner's claim that he is not "insured", and thus "qualified", based on the letter from the insurance company alleging there was no uninsured motorist coverage because this was a motorcycle accident, is unpersuasive. Motorcycles are not statutorily exempted from uninsured motorist coverage (*Matter of Len [Lumbermens Mut. Cas. Co.]*, 80 A.D.2d 682, 436 N.Y.S.2d 431; *Matter of Askey [General Acc. Fire & Life Assur. Corp.]*, 30 A.D.2d 632, 290 N.Y.S.2d 759, *affd.* 24 N.Y.2d 937, 302 N.Y.S.2d 576, 250 N.E.2d 65). Moreover, the uninsured motorist endorsement is to be construed in favor of inclusion in determining whom it covers (see *Matter of CountryWide Ins. Co. v. Wagoner*, 45 N.Y.2d 581, 586, 412 N.Y.S.2d 653, 384 N.E.2d 653). We note that petitioner never produced the insur- ... is evidence that ... an "insured". The evidence produced by petitioner was insufficient to establish that decedent was not an "insured".

Finally, we note that the parties did not raise or discuss the issue of whether the application of petitioner was premature since it has been held that a cause of action for wrongful death in such circumstances does not accrue until the appointment of an executor or an administrator (see *Matter of Sellars v. Motor Vehicle Acc. Ind. Corp.*, 20 A.D.2d 350, 353, 246 N.Y.S.2d 937). Consequently, we do not address that issue.

Order reversed, on the law, without costs, and petitioner's application denied.

The PEOPLE of the State of New York, Respondent,

v.

Richard P. LUCAS, Appellant.

Supreme Court, Appellate Division, Third Department.

Oct. 25, 1984.

Defendant was convicted of crimes charged in indictment, 95 Misc.2d 334, 406 N.Y.S.2d 1019, and on appeal convictions of intentional murder and felony-murder were affirmed, 73 A.D.2d 699, 422 N.Y.S.2d 534, but convictions of robbery and kidnapping were vacated. Murder convictions were then reversed by the Court of Appeals, 53 N.Y.2d 678, 439 N.Y.S.2d 99, 421 N.E.2d 494, and case was remanded for a second trial. On remand, defendant was convicted in the County Court, Sullivan County, Scheinman, J., of two counts of murder in the second degree, and he appealed. The

Supreme Court, Appellate Division, held that: (1) dismissal of robbery and kidnapping counts did not affect the two murder counts of the indictment upon which defendant was retried; (2) principle of double jeopardy did not bar retrial on ground that robbery and kidnapping charges served as underlying felonies; (3) trial court did not err in responding to jury's request for a clarification of reasonable doubt nor in refusing defendant's request to charge definition of immediate flight; (4) instruction on criminal liability for conduct of another was not erroneous; (5) a new trial was not required as the result of prosecutor's conduct; and (6) evidence, although circumstantial, was sufficient to sustain conviction notwithstanding that defendant testified to a version of the facts that established his innocence.

Affirmed.

1. Criminal Law ⇐1190

Appellate Division's dismissal of robbery and kidnapping counts did not affect two murder counts of indictment upon which defendant was retried.

2. Criminal Law ⇐161

Fundamental to prohibition against double jeopardy is a determination going to factual innocence. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐200(1)

A determination of factual innocence as to underlying felony will not bar a retrial of the felony-murder count under the principle of double jeopardy if felony-murder and the underlying felony are substantively and generically entirely separate and disconnected offenses. U.S.C.A. Const. Amend. 5.

4. Criminal Law ⇐200(1)

Retrial of the felony-murder count was not barred by the principle of double jeopardy, notwithstanding Appellate Division's dismissal of the robbery and kidnapping charges, where the dismissal was not a determination going to factual innocence and, even if it was, felony-murder and robbery and kidnapping were substantively and generically separate and disconnected offenses. U.S.C.A. Const.Amend. 6.

5. Homicide ⇐289

Trial court did not err in instructing jury that either robbery or kidnapping could serve as the underlying felony for felony-murder.

6. Criminal Law ⇐863(2)

Decision to respond to jury's request for clarification of reasonable doubt in murder prosecution by repeating rather than expounding upon an adequate original charge was not error.

7. Homicide ⇐289

Refusing to charge the definition of immediate flight, as that term was used in the felony-murder statute, was not error in absence of evidence that victim was killed after defendant had effectuated his escape following completion of underlying felonies. McKinney's Penal Law § 125.25, subd. 3.

8. Homicide ⇐286(1)

Instruction on criminal liability for conduct of another appropriately instructed jury on issue of intent in murder prosecution and was not erroneous.

9. Criminal Law ⇐1171.1(1)

Prosecutor's tactics in murder prosecution, though they may have occasionally strayed beyond bounds of proper advocacy, did not so prejudice defendant as to deprive him of a fair trial.

10. Criminal Law ⇐1166.23

Brief colloquy between defense counsel and trial court following counsel's objection to prosecutor's summation did not violate defendant's right to a fair trial.

11. Searches and Seizures ⇐3.8(1)

Second search of defendant's vehicle, conducted three days after initial search pursuant to a search warrant, was not illegal and did not require suppression of items seized. U.S.C.A. Const.Amend. 4.

12. Homicide ⇐251

Evidence, although circumstantial, was sufficient to sustain conviction of two counts of murder in the second degree.

13. Homicide ⇐254

In second-degree murder prosecution, mere fact that defendant testified to a version of the facts which would establish his innocence did not preclude the jury from returning a guilty verdict based upon the competing facts and inferences of the People's case.

14. Homicide ⇐354

Conduct of sentencing court when, although considering rehabilitation, it rejected same as a basis for fixing sentence in circumstances of homicide prosecution was not an abuse of discretion.

Carl J. Silverstein, Legal Aid Society of Sullivan County, Monticello, for appellant.

Stephen L. Lungen, Dist. Atty., Monticello, for respondent.

Before MAIN, J.P., and CASEY, MIKOLL, LEVINE and HARVEY, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Sullivan County, rendered October 28, 1981, upon a verdict convicting defendant of two counts of the crime of murder in the second degree.

Defendant was indicted in December, 1975 on charges of robbery, kidnapping, intentional murder and felony murder following the discovery of the body of Craig Mitton, who, along with the $25,647.19 he was supposed to deposit for his employer, had disappeared on October 13, 1975. Defendant and his codefendant, Richard Graham, were apprehended in Florida on October 19, 1975. A search of defendant's vehicle revealed Mitton's fingerprints on the inside of the trunk lid. The police investigation also led to the discovery of safe deposit boxes in New Jersey, obtained by defendant and Graham the day after Mitton was murdered, containing in excess of $20,000.

After separate jury trials, defendant and Graham were convicted of the crimes charged in the indictment. 95 Misc.2d 534, 406 N.Y.S.2d 1019. On defendant's appeal, this court affirmed the murder convictions, but vacated the robbery and kidnapping convictions on the theory that they merged into the felony murder (73 A.D.2d 699, 422 N.Y.S.2d 534). The Court of Appeals reversed the murder convictions, concluding that defendant's statement to the police during the return flight from Florida was taken in violation of defendant's right to counsel (53 N.Y.2d 678, 439 N.Y.S.2d 99, 421 N.E.2d 494). Defendant was retried on the intentional murder and felony murder counts of the indictment, and he was convicted of both counts. The case is here on appeal from the judgment rendered upon the second trial.

Defendant has alleged numerous errors in his brief on appeal. Although our discussion herein does not deal at length with all of the issues, we have considered each and every error asserted by defendant and find that none of them, either individually or collectively, require reversal. Accordingly, the judgment must be affirmed.

[1-5] As the basis for several of the alleged errors, defendant points to this court's prior dismissal of the counts of the indictment charging robbery and kidnapping (73 A.D.2d 699, 422 N.Y.S.2d 534, *supra*). Citing *People v. Mayo*, 48 N.Y.2d 245, 422 N.Y.S.2d 361, 397 N.E.2d 1166, defendant claims that he was improperly retried on the original indictment. Unlike *Mayo*, wherein the trial court had dismissed the sole charge of a single-count indictment for insufficient evidence, leaving no valid count upon which a retrial could be had, this court's dismissal of the robbery and kidnapping counts left unaffected the two murder counts of the indictment upon which defendant was retried. It is noteworthy that the Court of Appeals, after reversing the murder convictions, remitted this case to the trial court "for further proceedings on the indictment" (53

N.Y.2d 678, 683, 439 N.Y.S.2d 99, 421 N.E.2d 494, *supra*). Defendant also argues that the principle of double jeopardy barred retrial of the felony murder count since the robbery and kidnapping charges dismissed by this court served as the underlying felonies. Fundamental to the prohibition against double jeopardy is "a determination going to factual innocence" (*Matter of Pastrana v. Baker*, 55 N.Y.2d 315, 319, 449 N.Y.S.2d 461, 434 N.E.2d 697), and this court's dismissal of the robbery and kidnapping charges clearly did not constitute such a determination. In any event, felony murder and the underlying felony are "substantively and generically entirely separate and disconnected offenses" (*People v. Berzups*, 49 N.Y.2d 417, 427, 426 N.Y.S.2d 253, 402 N.E.2d 1155, quoting *People v. Nichols*, 230 N.Y. 221, 226, 129 N.E. 883). Thus, even a determination of factual innocence of the underlying felony will not bar a retrial of the felony murder count (*People v. Murray*, 92 A.D.2d 617, 459 N.Y.S.2d 810). It is further argued that the trial court erred in instructing the jury that either robbery or kidnapping could serve as the underlying felony for felony murder. The felony murder count of the indictment alleged both robbery and kidnapping as underlying felonies and, as noted above, this court's dismissal of the robbery and kidnapping counts left unaffected the felony murder count of the indictment. Accordingly, we reject defendant's claim that the trial court was precluded from charging kidnapping as a possible underlying felony.

[6-8] Concerning the charge to the jury, defendant also contends that the trial court erred in responding to the jury's request for a clarification of reasonable doubt and in refusing defendant's request to charge the definition of immediate flight, as that term is used in the felony murder statute (Penal Law, § 125.25, subd. 3). Under the circumstances herein, we perceive no error in the trial court's decision to respond to the jury's request for clarification of reasonable doubt by repeating rather than expounding upon an adequate original charge (*People v. Malloy*, 55 N.Y.2d 296, 303, 449 N.Y.S.2d 168, 434 N.E.2d 237, cert. den. 459 U.S. 847, 103 S.Ct. 104, 74 L.Ed.2d 93). Nor did the court err in refusing to charge the definition of immediate flight, for unlike *People v. Gladman*, 41 N.Y.2d 123, 390 N.Y.S.2d 912, 359 N.E.2d 420, where the defendant killed a police officer at a point remote both in time and place from the underlying robbery, the evidence herein does not present a factual issue as to whether the victim Mitton was killed after defendant had effectuated his escape following completion of the underlying felonies. We also find that the trial court's charge concerning criminal liability for the conduct of another (Penal Law, § 20.00) appropriately instructed the jury on the issue of intent (see *People v. Gibson*, 65 A.D.2d 235, 237, 411 N.Y.S.2d 71, lv. to app. den. 46 N.Y.2d 1080, cert. den. 444 U.S. 861, 100 S.Ct. 127, 62 L.Ed.2d 83) and, therefore, the court's refusal to further charge as requested by defendant does not require reversal.

[9, 10] We reject defendant's claim that a new trial is required as a result of the prosecutor's conduct. Our examination of the record does not reveal the type of flagrant pervasive pattern of prosecutorial misconduct, the cumulative effect of which has led appellate courts to order a new trial (see, e.g., *People v. Whalen*, 59 N.Y.2d 273, 280–281, 464 N.Y.S.2d 454, 451 N.E.2d 212; *People v. Mott*, 94 A.D.2d 415, 465 N.Y.S.2d 307; *People v. Dowdell*, 88 A.D.2d 239, 453 N.Y.S.2d 174). Taken in context, and considering the length of the trial, the issues raised and the instructions given by the trial court, we conclude that while the prosecutor may have occasionally strayed beyond the bounds of proper advocacy, the prosecutor's tactics did not so prejudice defendant as to deprive him of a fair trial (see *People v. Galloway*, 54 N.Y.2d 396, 446 N.Y.S.2d 9, 430 N.E.2d 885; *People v. Keppler*, 92 A.D.2d 1032, 461 N.Y.S.2d 513; *People v. Hopkins*, 86 A.D.2d 937, 940, 448 N.Y.S.2d 574, affd. 58 N.Y.2d 1079, 462 N.Y.S.2d 639, 449 N.E.2d 419). Nor do we find any merit in defendant's claim that he was denied a fair trial by the brief colloquy

between defense counsel and the trial court after one of counsel's objections during the prosecutor's summation.

[11] Next, there is no merit in defendant's claims that certain rulings by the court during the retrial require reversal. We also find no error in the trial court's *Sandoval* ruling, and we reject defendant's claim that the second search of his vehicle, conducted three days after the initial search pursuant to a search warrant, was illegal, requiring suppression of the items seized (see *People v. Graham*, 90 A.D.2d 198, 204–205, 457 N.Y.S.2d 962, lv. to app. dismd. 59 N.Y.2d 766, 464 N.Y.S.2d 1029, 451 N.E.2d 508, cert. den. — U.S. —, 104 S.Ct. 246, 78 L.Ed.2d 234).

[12, 13] Concerning defendant's argument as to the sufficiency of the proof, the Court of Appeals rejected defendant's claim that the indictment should have been dismissed at the close of the first trial (53 N.Y.2d 678, 681, 439 N.Y.S.2d 99, 421 N.E.2d 494, *supra*), and we reach the same conclusion herein since the proof at the second trial was substantially the same. Although circumstantial, the evidence was sufficient to support the jury's verdict. The mere fact that defendant testified to a version of the facts which would establish his innocence did not preclude the jury from returning a guilty verdict based upon the competing facts and inferences of the People's case (see *People v. Pena*, 50 N.Y.2d 400, 409, 429 N.Y.S.2d 410, 406 N.E.2d 1347, cert. den. 449 U.S. 1087, 101 S.Ct. 878, 66 L.Ed.2d 814).

[14] [illegible], we reject defendant's claim that [illegible]ust be resentenced. Unlike *People v. Murph*, 89 A.D.2d 672, 453 N.Y.S.2d 783, the record convinces us that the sentencing court did in fact consider rehabilitation, but in its discretion rejected that factor as a basis for fixing the sentence in the circumstances of this case. Since there was no abuse of discretion, the sentence should not be disturbed.

Judgment affirmed.

Robert D. McGINNIS, Respondent,

v.

TOWN OF ROTTERDAM, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Third Department.

Oct. 25, 1984.

Passenger brought action to recover for injuries sustained when vehicle in which he was riding allegedly went off a roadway due to failure of town to erect a "dead end" sign and to driver's impaired ability caused by alcohol. The Supreme Court, Trial Term, Schenectady County, Viscardi, J., dismissed the action against all defendants other than town and driver and subsequently entered judgment on jury verdict of $220,000 in favor of passenger and against both town and driver on an equal liability basis, and appeal was taken. The Supreme Court, Appellate Division held that the verdict was fair and reasonable and not excessive, in view of passenger's serious injuries, permanent loss of serviceable hearing in left ear and permanent loss of 40 to 45 percent of hearing in right ear, partial facial paralysis, extensive scarring, and continuing problem with loss of balance.

Judgment affirmed.

Damages ⇐132(14)

Jury verdict of $220,000 against town and driver and in favor of 19-year-old passenger of vehicle was not excessive or unfair, where passenger suffered serious injuries, permanent loss of serviceable hearing in left ear and permanent loss of 40 to 45 percent of hearing in right ear, partial facial paralysis, extensive scarring, and a continuing problem with balance.

James L. Pemberton, Schenectady, for appellant Town of Rotterdam.

APPENDIX B

Counties ⇐67

Record supported determination that Commissioner of Social Services for Delaware County had failed to file oath of office within the statutory period and, hence, that no hearing on charges was required in order to dismiss him from office. CPLR 7801 et seq.; Public Officers Law § 30.

G. G. Kramer, Sidney, for petitioner.

Robert H. McDowell, Delaware County Atty., Stamford, for respondent.

Before SWEENEY, J. P., and KANE, STALEY, MAIN and MIKOLL, JJ.

MEMORANDUM DECISION.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Delaware County) to review a determination of the Board of Supervisors of Delaware County, which dismissed petitioner from his position as Commissioner of Social Services for Delaware County.

This matter was previously before this court and the pertinent facts need not be repeated here as they are sufficiently set forth in our memorandum decision in *Matter of Comins v. County of Delaware*, 66 A.D.2d 966, 412 N.Y.S.2d 428. Determination was withheld and the matter was remitted by this court to the Trial Term of Supreme Court, Delaware County, for a trial and decision resolving the issue of whether petitioner filed his oath of office within 30 days after notice of his appointment, or within 30 days after commencement of his term pursuant to section 30 of the Public Officers Law. A trial was held and Trial Term determined that there was a failure to file an oath of office within the statutory period set forth in section 30 of the Public Officers Law. We are of the view that Trial Term properly decided the issue concerning petitioner's failure to timely file an oath of office. As we previously stated, if petitioner did fail to timely file, no hearing on charges was required in order to dismiss him from office (*Matter of Comins v. County of Delaware, supra*). Accordingly, the determination of the Board of Supervisors of Delaware County should be confirmed.

Determination confirmed, and petitions dismissed, without costs.

73 A.D.2d 699

The PEOPLE of the State of New York, Respondent,

v.

Richard P. LUCAS, Appellant.

Supreme Court, Appellate Division, Third Department.

Dec. 6, 1979.

Defendant was convicted in County Court, Sullivan County, 95 Misc.2d 334, 406 N.Y.S.2d 1019, Louis B. Scheinman, J., of murder and other crimes, and he appealed. The Supreme Court, Appellate Division, Third Division, Third Department, held, inter alia, that a delay of 31 months between defendant's arrest and commencement of his trial did not constitute unreasonable delay where it was largely caused by defendant himself.

Modified and affirmed.

1. Criminal Law ⇐1172.1(1)

Errors in jury charge in murder-kidnapping prosecution, if any, were not so substantial as to deprive defendant of fair trial or require reversal of his conviction.

2. Criminal Law ⇐577.15(3)

Delay of 31 months between defendant's arrest on murder-kidnapping charges and commencement of his trial did not constitute unreasonable delay where it was occasioned, in large part, by defendant's own actions.

[illegible] of murder suspect to police investigator after suspect's arrest was properly admitted in evidence after prosecution met its burden of proving that statement was voluntary and spontaneous. U.S.C.A. Const. Amend. 5.

4. Homicide ⇐254

Overwhelming evidence supported defendant's conviction of second-degree murder.

Carl J. Silverstein, Monticello, for appellant.

Stephen F. Lungen, Asst. Dist. Atty. of Sullivan County, Liberty, for respondent.

Before SWEENEY, J. P., and STALEY, MAIN, MIKOLL and HERLIHY, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Sullivan County, rendered July 14, 1978, upon a verdict convicting defendant of murder in the second degree (two counts), kidnapping in the first degree, and robbery in the first degree.

Craig R. Mitton, who collected daily revenues from service stations for his employer, Mid-Valley Petroleum Corporation of Newburgh, New York, disappeared after leaving company offices at approximately 4:30 P.M. on October 13, 1975 to make a deposit which totalled $25,647.19. His body, bearing three bullet wounds and marks of a blow to the head, was discovered in Sullivan County two days later. The coroner indicated that based on his findings, Mitton had been shot between 4:00 P.M. and 7:00 P.M. on October 13, 1975.

At approximately 4:00 P.M. on October 13, 1975 defendant and another person were seen in defendant's car near the bank at which Mitton was to make the deposit. Earlier in the day defendant had been with one Richard Graham. Graham had been fired on October 1, 1975 from the position Mitton held because he had misappropriated company funds, and because he had retained a $30,000 deposit overnight.

[illegible] time between 7:30 P.M. and 8:00 P.M. on October 13, 1975 defendant and Graham arrived at the home of defendant's girlfriend, Cheryl Kilb, in Walden, New York. Also at the house was Roberta Holmes, who was Graham's girlfriend. Later that evening, the four drove to Newark, New Jersey, where they spent the night.

The following day defendant and Graham purchased travelers checks, and each opened a safe deposit box, giving addresses in Newark, New Jersey. Later, when police officers opened these boxes, each contained over $10,000 in cash. On October 18, 1975 the police learned that defendant and Graham were registered in a motel in Dania, Florida. On October 19 the police entered the motel rooms and arrested defendant. Defendant waived an extradition hearing, and was returned to New York. While enroute to New York, defendant told a police officer that, if he could talk to the District Attorney, he could explain that he did not do everything.

After trial, the jury found defendant guilty of intentional murder, felony murder, kidnapping in the first degree, and robbery in the first degree. He was sentenced to a term of 25 years to life on the intentional murder conviction; 25 years to life on the felony murder conviction; 25 years to life on the kidnapping conviction; and eight and one-third to 25 years on the robbery conviction—the first three sentences to run concurrently, and the last to run consecutively.

Defendant's first contention is that the sentence was improper because: (1) the kidnapping charge merged with the robbery conviction; (2) since he had been convicted of felony murder, the predicate felony should have been dismissed as a lesser included offense; and (3) in any event, the court should not have imposed a consecutive term on the robbery conviction.

On the appeal to this court from the judgment of conviction of Graham on identical counts, it was held that, since Graham was convicted of felony murder, the predicate felony charge of robbery should be dismissed, and also that the kidnapping

charge merged into the robbery charge. In the Graham case, the judgments imposed for conviction of kidnapping in the first degree and robbery in the first degree were vacated, and the counts of the indictment therefor were dismissed (*People v. Graham*, 69 A.D.2d 544, 549, 419 N.Y.S.2d 290, 293). Accordingly, the judgment convicting defendant of the charges of kidnapping and robbery should be vacated, and the counts of the indictment therefor should be dismissed.

[1] Defendant asserts that the trial court made numerous errors in its charge to the jury. Some of the alleged errors were not objected to and, therefore, were not preserved for review (CPL 470.05, subd. 2; *People v. Patterson*, 39 N.Y.2d 288, 383 N.Y.S.2d 573, 347 N.E.2d 898). Most of the objections to the charge were frivolous and if some errors do exist, they were not so substantial as to deprive defendant of a fair trial, or to require a reversal (*People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787; *People v. Harris*, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349).

[2] Defendant further argues that the 31 months which elapsed between his arrest on October 19, 1975 and the commencement of his trial on May 15, 1978 constituted unreasonable delay as a matter of law. The District Attorney concedes that, if the entire delay were attributable to him, defendant's right to a speedy trial might well have been violated. However, the prosecution maintains that most of the delay is attributable to defendant.

The period from December 4, 1975 until May 26, 1976, approximately six months, was taken up with defendant's making his omnibus motion, and entering the order thereon. Defendant also made other motions prior to June 2, 1977 when the People were ready to proceed to trial. Moreover, defendant indicated on June 2, that he was not ready for trial, and asked that the Graham case be tried first.

Graham's trial ended on October 14, 1977. On November 11, 1977 the District Attorney again moved this case for trial, but defendant claimed that he was about to move for a change of venue. Such motion was made on December 15, 1977 and was denied on February 2, 1978. In the meantime, defendant's counsel had withdrawn. Present counsel was appointed on February 13, 1978 and proceeded to bring 10 motions over the next four months. Trial was eventually commenced on May 15, 1978. Based on these facts, most of the delay was attributable to defendant, and his contention should be rejected (*People v. Goldsmer*, 48 A.D.2d 748, 368 N.Y.S.2d 323, *affd.* 39 N.Y.2d 656, 385 N.Y.S.2d 274, 350 N.E.2d 604).

[3] When defendant was arrested on October 19, 1975, he was advised of his constitutional rights and, upon his arrival at the police station, he executed a *Miranda* waiver, and indicated he wanted an attorney. Defendant now contends that the statement he made on the plane to Investigator Reidy, prior to his representation by counsel, to the effect that if he could talk to the District Attorney he could explain that he did not do everything, was inadmissible. The court ruled that the statement was admissible on the ground that the evidence established that the statement was spontaneous.

After defendant waived extradition, he was transported back to New York by airplane accompanied by Investigator Reidy. During the flight, defendant initiated a conversation with Reidy with his main line of inquiry relating to what, if anything, the District Attorney would do for him with respect to the homicide.

Volunteered spontaneous statements are admissible, and such statements are not barred by the Fifth Amendment (*People v. Robles*, 27 N.Y.2d 155, 314 N.Y.S.2d 793, 263 N.E.2d 304; *People v. Kaye*, 25 N.Y.2d 139, 303 N.Y.S.2d 41, 250 N.E.2d 329). The record supports the finding that the prosecution met its burden of proving that defendant's statement was voluntary and spontaneous and, therefore, admissible.

[4] We have considered the other contentions of defendant, and find that either they are without merit, or were reviewed and disposed of in *People v. Graham* (*supra*). In view of the overwhelming evidence proving defendant's guilt beyond a reasonable doubt, the judgment of conviction of murder in the second degree should be affirmed, and the convictions of kidnapping in the first degree and robbery in the first degree should be reversed.

Judgment modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

1. Criminal Law ⇐531(3)

In ruling on motion to suppress written confession the trial court was entitled to discredit defendant's version of circumstances under which it was obtained, especially since testimony of remaining witnesses established beyond a reasonable doubt that the challenged statement was voluntarily given following proper *Miranda* admonitions.

2. Criminal Law ⇐531(2)

Fact that interrogation was of short duration, that defendant was allowed to and did converse with a friend and that she, as well as police, had made arrangements for care of her children were relevant considerations in determining voluntariness of written confession.

3. Criminal Law ⇐1053

Although evidence did not justify submission of criminally negligent homicide as lesser included offense of second-degree manslaughter appellate review of such submission was precluded absent any exception to the submission. CPL 300.50, subd. 1.

---

73 A.D.2d 700

The PEOPLE of the State of New York, Respondent,

v.

Joyce G. DUNTLEY, Appellant.

Supreme Court, Appellate Division, Third Department.

Dec. 6, 1979.

Appeal was taken from a judgment of the County Court of Essex County, Charles P. Garvey, J., under verdict convicting defendant of burglary in the second degree and criminally negligent homicide. The Supreme Court, Appellate Division, held that: (1) findings in support of denial of pretrial motion to suppress written confession could not be disturbed, and (2) absent exception to submission of issue of criminally negligent homicide as lesser included offense of second-degree manslaughter, any apparent inconsistency in the verdict rendered was not reviewable.

Affirmed.

Livingston L. Hatch, Keeseville (Emily C. Neville, Keene Valley, of counsel), for appellant.

John C. McDonald, Essex County Dist. Atty., Ticonderoga (Edward D. Saslaw, Carmel, of counsel), for respondent.

Before SWEENEY, J. P., and KANE, STALEY, MIKOLL and HERLIHY, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Essex County, rendered June 7, 1978, upon a verdict convicting defendant of the crimes of burglary in the second degree and criminally negligent homicide.

[1, 2] We have carefully examined all of the issues presented by defendant on this appeal and conclude that only a few of them merit discussion. Her pre-trial motion to suppress a written confession was properly resolved. The trial court obviously discredited her version of the circumstances

APPENDIX C

and the admissions made, the detention was supported by probable cause.

Finally, we reject defendant's reading of *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824, *supra*, which he contends requires suppression of all evidence gathered during an illegal detention. The fact that an illegal detention is not to be construed as a predicate for immunity from the gathering or introduction of incriminating evidence (see *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537, *supra*) is supported by the fact that in *Brown v. Illinois (supra)*, as well as other cases, the United States Supreme Court emphasized that there are legitimate ways to remove the taint of illegality. Significantly, as distinguished from this case, *Dunaway* involved the narrower question of the propriety of custodial detentions for investigative purposes when probable cause does not exist. While we agree that such an unreasonable detention violates the Fourth Amendment, we decline to extend the impact of that holding to require exclusion, after such a detention, of evidence acquired independently of the illegal arrest.

The exclusionary rule exacts a heavy penalty, and although its operation is justified, the exclusion of evidence should be for therapeutic reasons and should not be used as a punitive measure. The application of the exclusionary rule requires a commonsense appraisal of whether the suppression of the challenged evidence will remove in the future the motive for similar improper police conduct. In this analysis, it has never been enough to show that evidence must be suppressed simply because it was discovered subsequent to an illegal arrest; it must in addition be shown that the police exploited the illegal detention in such a way as to establish that it was the detention which produced the challenged statements. In a case such as this, where the trial court is satisfied on sufficient evidence that the required nexus between the detention and the statements is absent, there would be no deterrence and therefore no reason to invoke the exclusionary rule (cf. *Dunaway v. New York*, 442 U.S. 200, 218, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824, *supra*).

Accordingly, the order of the Appellate Division should be affirmed.

COOKE, C. J., and JASEN, GABRIELLI, JONES, FUCHSBERG and MEYER, JJ., concur.

Order affirmed.

421 N.E.2d 494
53 N.Y.2d 678

The PEOPLE of the State of New York, Respondent-Appellant,

v.

Richard P. LUCAS, Appellant-Respondent.

Court of Appeals of New York.

March 26, 1981.

Defendant was convicted in the County Court, Sullivan County, 95 Misc.2d 334, 406 N.Y.S.2d 1019, Louis B. Scheinman, J., of murder and other crimes, and he appealed. The Supreme Court, Appellate Division, Third Division, Third Department, 73 A.D.2d 699, 422 N.Y.S.2d 534, modified and affirmed, and cross appeals were taken. The Court of Appeals held that: (1) where defendant was in custody at time he made uncounselled, inculpatory statement while being transported from Florida to New York following an extradition proceeding, defendant's "indelible" right to counsel had attached and any waiver of that right made in absence of counsel would have to be deemed invalid; (2) where police officer, by engaging in discussion with defendant concerning crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked uncounselled, inculpatory statement from defend-

[illegible] such was not "spontaneous" and should have been suppressed, or

from which People appealed recited that modification was made on the law and the facts and an examination of the Appellate Division opinion indicated that recitation in order was accurate, appellate court had no power to entertain People's appeal.

Reversed.

Jason, J., concurred with opinion.

1. Criminal Law ⇐412.2(5)

Where defendant was in custody at time he made uncounselled, inculpatory statement and had previously requested the assistance of an attorney, defendant's "indelible" right to counsel had attached and any waiver of that right made in absence of counsel would have to be deemed invalid.

2. Criminal Law ⇐412.1(4)

Where police officer, by engaging in discussion with defendant concerning crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked uncounselled, inculpatory statement from defendant, statement could not be considered "spontaneous" under any view of the facts, and should have been suppressed.

3. Criminal Law ⇐1024(1)

Where order from which People appealed recited that modification was made "on the law and the facts," and examination of the appellate division opinion indicated that recitation in order was accurate, appellate court had no power to entertain the People's appeal.

Carl J. Silverstein, Monticello, for appellant.

Joseph Jaffe, Dist. Atty. (Stephen F. Lungen, Asst. Dist. Atty., of counsel), for respondent.

Robert Abrams, Atty. Gen. (Frederick R. Walsh and Shirley Adelson Siegel, Asst. Attys. Gen., of counsel), in his statutory capacity pursuant to section 71 of the Executive Law.

MEMORANDUM.

Insofar as appealed from by defendant, the order of the Appellate Division, 73 A.D.2d 699, 422 N.Y.S.2d 534, should be reversed, the statements made by defendant on the airplane and the physical evidence seized in the motel room suppressed and the case remitted for further proceedings on the indictment. The cross appeal taken by the People should be dismissed.

Following a jury trial, defendant was convicted of murder in the second degree, kidnapping in the first degree and robbery in the first degree. The Appellate Division modified the judgment, 95 Misc.2d 334, 406 N.Y.S.2d 1019, on the law and the facts, by dismissing the kidnapping and robbery counts. We conclude that the remaining conviction for murder in the second degree must be reversed, because the trial court erroneously permitted the introduction of certain illegally obtained evidence.

[1] One of the more damaging items of evidence introduced at the trial was an uncounseled, inculpatory statement made by defendant while he was being transported from Florida to New York following an extradition proceeding. By the time the statement was made, a warrant for defendant's arrest on this charge had been issued by a Magistrate in New York. Moreover, it is undisputed that defendant was in custody at the time he made the statement and that he had previously requested the assistance of an attorney. Hence, defendant's "indelible" right to counsel had attached and any waiver of that right made in the absence of counsel would have to be deemed invalid (*People v. Samuels*, 49 N.Y.2d 218, 424 N.Y.S.2d 892, 400 N.E.2d 1344; *People v. Cunningham*, 49 N.Y.2d 203, 424 N.Y.S.2d 421, 400 N.E.2d 360; see *People v. Settles*, 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612). Nevertheless, the courts below concluded that the uncounseled statement in question need not be suppressed, since, in their view, it was made "voluntarily" and "spontaneously" (see *People v. Kaye*, 25

N.Y.2d 139, 303 N.Y.S.2d 41, 250 N.E.2d 329). This conclusion, however, is simply not supported by the record.

[2] According to the credited testimony of Officer Reidy, who was present when the statement was made, defendant initiated the conversation by asking the officer whether it was permissible to discuss the case. The officer replied in the affirmative, but reminded defendant that any statements he made could be used against him at trial. Defendant, in turn, acknowledged this admonition, but indicated that he wished to ask some questions about the pending charges. He then proceeded to ask Officer Reidy about the status of his case. Officer Reidy replied by informing him that the District Attorney had already obtained a 14-page statement from his alleged accomplice, Richard Graham, in which Graham acknowledged his own participation in the underlying robbery, but accused defendant of having been the sole perpetrator of the murder. Defendant responded immediately stating: "Well, I would like to talk to somebody about th[illegible] I might have been involved, but I did[illegible] do—I didn't kill anybody".

This statement cannot be considered "spontaneous" under any view of the facts, since it was not a blurted-out admission, but was instead the product of an "extended discussion" between defendant and the police officer (*People v. Cunningham, supra*, at p. 210, n. 2, 424 N.Y.S.2d 421, 400 N.E.2d 360). It is not of controlling significance that the statement was "volunteered" in the sense that it was not made in response to direct interrogation, for, as we have previously observed, "the spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v. Maerling*, 46 N.Y.2d 289, 302 303, 413 N.Y.S.2d 316, 385 N.E.2d 1245). Here, there can be no doubt that the police officer, by engaging in the discussion with defendant concerning the crime with which he was charged and by informing defendant of his alleged accomplice's statement, evoked the uncounseled, inculpatory statement from the defendant. Accordingly, the statement made by defendant should have been suppressed.

1 The trial court also erred in refusing to 1 suppress certain items of physical evidence which were seized from defendant's Florida motel room immediately after his arrest. The seized items included: a brown briefcase purportedly owned by Graham, a black briefcase purportedly owned by defendant, a safe deposit box key for a box registered in defendant's name, receipts for American Express travelers' checks issued to defendant, a card showing defendant's and Graham's addresses and several Western Union receipts for money orders allegedly sent by defendant to friends in New York. As the People have candidly conceded, the warrantless search of defendant's motel room was "overbroad", extending far beyond the permissible scope of a search incident to a lawful arrest (see *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685). Hence, the evidence seized during the course of the search must be suppressed.* We note, however, that any information related to the suppressed physical evidence which the police legitimately obtained through independent sources may be used in evidence against defendant if the People decide to retry him on the remaining murder count.

Inasmuch as we have concluded that there must be a new trial because of the erroneous suppression rulings discussed above, we find it unnecessary to consider the numerous claims made by defendant concerning a variety of supposed trial error. It should be noted, however, that we find no merit to defendant's contention that the entire indictment should have been dismissed at the close of the trial for lack of legally sufficient evidence. Nor can we agree that the indictment should have been dismissed on the ground that defendant was denied his constitutional right to a speedy trial, since, as the courts below found, the delays in the proceedings were attributable, for the most part, to defendant's own actions.

1 1[3] Finally, we hold that the People's cross appeal from so much of the Appellate Division order as dismissed the kidnapping and robbery counts must be dismissed. The order from which the People appeal recites that the modification was made "on the law and the facts", and an examination of the Appellate Division opinion indicates that the recitation in the order is accurate. Thus, we have no power to entertain the People's appeal (CPL 450.90, subd. 2, par. [a]).

JASEN, Judge (concurring).

I agree with the majority that defendant's inculpatory statement to Officer Reidy was not "spontaneous" as a matter of law. I disagree, however, with the standard employed by the majority in reaching this conclusion and, therefore, am unable to join in their opinion.

The majority, adopting language used by this court in *People v. Maerling*, 46 N.Y.2d 289, 302–303, 413 N.Y.S.2d 316, 385 N.E.2d 1245), states that spontaneity must "be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed." While I have no quarrel with this general proposition, I do not believe that it states the appropriate standard to applied in determining whether or not a statement was truly spontaneous. In my view, the quoted language from *People v. Maerling* was meant merely to illustrate instances of nonspontaneous declarations and was not intended to be a pronouncement of the legal test to be utilized by a suppression court confronted with the task of determining whether a statement was spontaneous when made.

More recently, in *People v. Lynes*, 49 N.Y.2d 286, 425 N.Y.S.2d 295, 401 N.E.2d 405, this court had the opportunity again to address the question whether an uncounseled statement was truly spontaneous. In *Lynes*, we stated that the test to be employed by a suppression court in such situations is "whether the defendant's statement can be said to have been triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant". (*People v. Lynes, supra*, at p. 295, 425 N.Y.S.2d 295, 401 N.E.2d 405.) Rather than attempting to pigeonhole defendant's statement into one of the categories delineated in *People v. Maerling*, the present case should be measured under the more appropriate *Lynes* standard.

1 Applying the test in *People v. Lynes*, 1 there can be no doubt that defendant's inculpatory statement was not spontaneous. Indeed, it was only after the extended discussion between Officer Reidy and defendant, in which Reidy informed defendant of the current status of the charges pending against him and of his alleged accomplice's statement, that defendant came forth with the inculpatory statement. Under any view of the facts, defendant's statement can only have been the result of this ongoing conversation with Officer Reidy "which should reasonably have been anticipated to evoke a declaration from the defendant." (*People v. Lynes, supra*, at p. 295, 425 N.Y.S.2d 295, 401 N.E.2d 405.) Thus, as a matter of law, this uncounseled statement was not spontaneous and should have been suppressed.

COOKE, C. J., and GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

JASEN, J., concurs in a concurring opinion.

On defendant's appeal: Order reversed, statement made by defendant on the airplane and physical evidence seized in the motel room suppressed and the case remit-

* We reject defendant's additional argument that two safe deposit box keys for a box registered in Graham's name should have been suppressed. These keys were taken directly from a purse owned by Roberta Holmes, a friend who had accompanied the two men on their sojourn to Florida. Since Holmes was carrying the purse on her person at the time it was searched by the police officers, defendant has no standing to challenge the legality of the search; inasmuch as the safe deposit box in question was registered in Graham's name and there is no showing that Lucas had any legal interest therein, he had no standing to challenge the seizure (cf. *United States v. Lisk*, 522 F.2d 228 (7 Cir.), cert. den. 423 U.S. 1078, 96 S.Ct. 865, 47 L.Ed.2d 89).

ted to Sullivan County Court for further proceedings on the indictment.

On People's appeal: Appeal dismissed.

421 N.E.2d 498
53 N.Y.2d 687

[1] Arthur PASHCOW et al., Doing Business as Town Realty Company (Dix Hills Company) et al., Appellants,

v.

TOWN OF BABYLON, Respondent.

Court of Appeals of New York.

March 31, 1981.

Town appealed from order and judgment of the Supreme Court, Special Term, Suffolk County, John G. McCarthy, J., which granted summary judgment to plaintiffs, declaring local ordinance unconstitutional. The Supreme Court, Appellate Division, Second Judicial Department, 78 A.D.2d 694, 434 N.Y.S.2d 663, reversed, on the law, and plaintiffs appealed. The Court of Appeals held that in view of fact that local ordinance requires consent or a warrant for an administrative search except in emergency situations, such ordinance is not unconstitutional on its face.

Affirmed.

Municipal Corporations ⇐594(1)

In view of fact that local ordinance requires consent or a warrant for an administrative search except in emergency situations, such ordinance is not unconstitutional on its face.

---

[1] Alan Manning Miller, Cork Place, for appellant.

Joseph F. Klein, Town Atty., Lendenhurst, (Patrick J. Barton, Elmira, of counsel), for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 78 A.D.2d 694, 434 N.Y.S.2d 663, should be affirmed, with costs.

In this action for a declaratory judgment is cannot be said that the ordinance of the Town of Babylon is unconstitutional on its face, for it does require consent or a warrant for an administrative search except in emergency situations. The court may not speculate, at this juncture, concerning the possible application of the ordinance in an unconstitutional manner, but we note that an owner's ability to rent his premises may not be conditioned upon his consent to a warrantless inspection (see *Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 438 N.Y.S.2d 257, 420 N.E.2d 55).

COOKE, C. J., and JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

Order affirmed, with costs, in a memorandum.

421 N.E.2d 498
53 N.Y.2d 694

[1] In the Matter of the Arbitration between [1] Doris ALLEN, Appellant,

and

NEW YORK STATE et al., Respondents.

Civil Service Employees Association, Inc., as Party in Interest.

Court of Appeals of New York.

March 31, 1981.

State appealed from an order of the Supreme Court, Special Term, Richmond

The PEOPLE of the State of New York

v.

Richard B. GRAHAM and Richard P. Lucas, Defendants.

County Court, Sullivan County.

June 16, 1977.

In prosecution for murder in the second degree, kidnapping, and robbery, defendants filed motion to suppress certain tangible evidence seized pursuant to search warrants and also warrantless arrest and to suppress certain confessions or admissions. The County Court, County of Sullivan, Louis B. Scheinman, J., held that (1) record established that defendant knowingly, intelligently and voluntarily waived his right to remain silent and to counsel when defendant confessed, and (2) New York had greatest interest in case with respect to New Jersey searches and Florida arrest, searches, and confessions or admissions, and thus law of New York would be applied in deciding motions to suppress physical evidence.

Motions denied.

1. Criminal Law ⇐394.6(1)

Clear and convincing evidence test applied on motion to suppress evidence other than confession.

2. Criminal Law ⇐531(3)

Reasonable doubt test applied with respect to evidence concerning voluntariness of confession.

3. Criminal Law ⇐531(3)

In prosecution for murder in the second degree, kidnapping, and robbery, record established beyond a reasonable doubt that defendant knowingly, intelligently and voluntarily waived his right to remain silent and to counsel when he confessed.

4. Action ⇐17

Where evidence is legally obtained, in violation of local law, but not rising to constitutional proportions, forum court can select law to be applied.

5. Action ⇐17

Where alleged murder, kidnapping and robbery occurred in New York, where New York citizen was victim, where all defendants were residents of New York and almost all witnesses in New York prosecution were New York residents, and where police activity in New Jersey and Florida was mainly conducted by New York state police officers with assistance of local police officers and facilities, state of New York had greatest interest in case with respect to New Jersey searches and Florida arrests, searches, and confessions or admissions, and thus New York law would be applied in deciding defendants' motions to suppress physical evidence.

Emanuel Gellman, Dist. Atty. of Sullivan County, Monticello, by Stephen F. Langen, Asst. Dist. Atty., of counsel.

Stephen L. Oppenheim, Monticello, for defendant Richard B. Graham.

Legal Aid Society of Sullivan County by Michael Zager, Monticello, of counsel, for defendant Richard P. Lucas.

LOUIS B. SCHEINMAN, Judge.

These are motions by defendants to suppress certain tangible evidence seized pursuant to search warrants and also a warrantless arrest, and to suppress certain confessions or admissions.

The indictment charges defendants with the crimes of murder in the second degree, kidnapping and robbery.

Although the cases have been severed for trial, these hearings were combined and held jointly, pursuant to stipulation.

[1, 2] This opinion will set forth the facts found by this Court in making its determination (C.P.L. 710.60 subd. 4). Although different standards of proof are required on the several types of suppression sought (*People v. Pabilonia*, 32 N.Y.2d 356, 345 N.Y.S.2d 482, 298 N.E.2d 637, clear and convincing evidence test on motion to sup-

[Criminal Law, Search and Seizure ⇐1159(5)]

Defendant lacked standing to contest the legality of search of the trunk lid of codefendant's car, from which victim's lingerie were taken; moreover, apart from standing, even were it held that the police had exhausted their authority to search under the warrant by the initial search of the car, new probable cause for a second search was established by defendant's confession.

[Criminal Law ⇐1159.1(8)]

Although items seized at motel following defendant's arrest should have been suppressed both under Payton and because the search leading to their discovery was "overbroad," any error in admitting those items into evidence was harmless since there was no reasonable possibility that the erroneous admission of those items contributed to defendant's conviction; the admissible evidence constituted overwhelming proof of his guilt.

Stephen L. Oppenheim, Monticello, for appellant.

Stephen Lungen, Dist. Atty., Monticello, for respondent.

Before MAHONEY, P.J., and SWEENEY, KANE, WEISS and LEVINE, JJ.

LEVINE, Justice.

This case, which has been before this court on two prior occasions (69 A.D.2d 544, 419 N.Y.S.2d 290, 76 A.D.2d 228, 431 N.Y.S.2d 209), again comes to us on remand from the United States Supreme Court, — U.S. —, 102 S.Ct. 3479, 73 L.Ed.2d 1262, for further consideration in light of that court's recent decision in United States v. Johnson, 457 U.S. —, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), wherein it was held that

1. On a previous remand to this court from the United States Supreme Court, 446 U.S. 922, 100 S.Ct. 2167, 64 L.Ed.2d 785, to consider defendant's conviction in light of Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639, we adhered to our original decision modifying defendant's conviction after concluding that Payton was not entitled to ret

the rule announced in Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) applied retroactively to all convictions that were not yet final at the time the decision was rendered. The Supreme Court concluded in Payton that, absent exigent circumstances, the Fourth Amendment to the United States Constitution prohibited police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

[1] The People attempt to evade the application of Payton to this case by arguing that the arrest of defendant and Richard Lucas in a Florida motel was not a "routine felony arrest" and, in any event, was made under "exigent circumstances." Neither argument is persuasive. The police officers who arrested defendant and Lucas at 8:00 a.m. on October 19, 1975 did so on the mistaken belief that a warrant for their arrest had been issued at 7:00 p.m. on October 18, 1975. The police had the motel rooms under surveillance the entire evening and waited two hours following the 6:00 a.m. arrival of defendant and his party at their rooms the following morning before making the arrests.[1] Thus, the police officers had ample time to obtain a warrant which, except for an administrative error, would have been issued. These circumstances, in addition to falling short of the exigent nature needed to fall outside of the scope of Payton, also undercut the People's argument that this was something other than a routine felony arrest.

Having concluded that defendant's arrest violated his Fourth Amendment rights upon retroactive application of Payton v. New York (supra), we now turn to a discussion of the consequences of this holding on the admissibility of the evidence used to convict defendant. Among such evidence was defendant's detailed confession, which he now

respective application (People v. Graham, 76 A.D.2d 228, 431 N.Y.S.2d 209).

2. The facts of this case are more fully reported in earlier decisions (People v. Graham, 90 Misc.2d 1019, 396 N.Y.S.2d 906, 69 A.D.2d 544, 419 N.Y.S.2d 290).

contends must be suppressed as the fruit of the poisonous tree of his illegal arrest. We disagree. The standard for determining the admissibility of a confession obtained in the context of an illegal search and seizure has developed out of the decisions by the United States Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 and, most recently, *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633. *Wong Sun* established that even though it can be said that the confession arose out of an illegal arrest (i.e., "but for" causality), it need not be suppressed if the police misconduct is sufficiently separable, or there were other intervening factors sufficient to conclude that the confession was not the product of the illegality but of the accused's own untainted free will. The court said:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " (*Wong Sun v. United States*, 371 U.S. 471, 487–488, 83 S.Ct. 407, 417–418, 9 L.Ed.2d 441 supra).

Thus, the court suppressed a codefendant's statement which followed immediately after his illegal arrest on the grounds that it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion" (id. at 486, 83 S.Ct. at 416). However, the court upheld *Wong Sun's* conclusion, coming after the arraignment in court and release from custody, because the connection between his unlawful arrest and the statement "had become so attenuated as to dissipate the taint" (id. at 491, 83 S.Ct. at 419).

[2] In Brown, the court more clearly articulated that the admissibility of a confession arising out of an illegal arrest involves a dual inquiry: first, causality, i.e., whether the proffered statement was the product of his own free will untainted by the official misconduct; second, the purpose and flagrancy of the acts of the police, taking into account the underlying objectives of the exclusionary rule to deter lawless police activity and to preserve judicial integrity (see *Brown v. Illinois*, 422 U.S. 590, 602–604, 95 S.Ct. 2254, 2261–2262, 45 L.Ed.2d 416, supra). Indeed, the culpability of the police was identified as of particular significance (id. at 604, 95 S.Ct. at 2262). In Brown, the confession failed under both of the dual aspects of the test. It followed in close temporal proximity to the illegal arrest without any significant intervening circumstances, thus establishing causal relationship. And the police conduct was purposeful and flagrant.

The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion (id. at 605, 95 S.Ct. at 2262).

[3] In Rawlings, the Supreme Court further refined the test of admissibility in two interrelated respects: first, the close temporal proximity of the illegal action of the police to the arising of the incriminating statement is implicitly but unmistakably rejected as per se determinative of a causal relationship. In Rawlings, the inculpatory admission occurred within minutes after illegal detention of the accused, and followed immediately upon the police's unlawful seizure of his companion's pocketbook. The court nevertheless found this insufficient alone to establish causality. Second, in weighing causality, Rawlings required a close analysis of all of the circumstances surrounding the giving of the confession, and particularly the relationship in fact between the statement and the actual conduct of the police found to be illegal.

Although under the strictest of custodial conditions such a short lapse of time might not suffice to purge the initial taint, we believe it necessary to examine the precise conditions under which the

APPENDIX F

State of New York
Court of Appeals

BEFORE: HON. SOL WACHTLER, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

RICHARD P. LUCAS,

Appellant.

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied

Dated at Albany New York

April 23 1985

Chief Judge

"Description of Order. Judgment of the County Court, Sullivan County, October 28, 1981; affirmed by the Appellate Division, Third Department, September 4, 1984.

APPENDIX G

50 A.D.2d 1058

The PEOPLE of the State of New York, Respondent,

v.

Richard H. GRAHAM, Appellant.

Supreme Court, Appellate Division, Third Department

Dec. 9, 1982

Defendant was convicted in the County Court, Sullivan County, Lewis B. Stedman, J., of second-degree murder, first-degree kidnapping, and first-degree robbery, and he appealed. The Supreme Court, Appellate Division, 69 A.D.2d 944, 419 N.Y.S.2d 290, affirmed as modified. The United States Supreme Court, 446 U.S. 922, 100 S.Ct. 2117, 64 L.Ed.2d 783, granted defendant's petition for certiorari and vacated and remanded. On remand, the Supreme Court, Appellate Division, 76 A.D.2d 228, 431 N.Y.S.2d 220, affirmed as modified. The Supreme Court, 102 S.Ct. 2417, 73 L.Ed.2d 1302, vacated and remanded for further consideration in light of Johnson. Upon remand, the Supreme Court, Appellate Division, Levine, J., held that: (1) warrantless arrest of defendant and another in motel was a "routine felony arrest" and was not made under "exigent circumstances," according, the arrest violated defendant's Fourth Amendment rights under retroactive application of Payton, and (2) although defendant's arrest violated his Fourth Amendment rights, his ensuing confession was nonetheless admissible, since there was no causal connection between the confession and the illegal entry of motel room by the police; furthermore, the acts of the police were not so purposefully and flagrantly illegal as to require application of the exclusionary rule in order to deter official misconduct or to preserve judicial integrity.

Judgment affirmed as modified.

Kane, J., filed a concurring opinion.

Mahoney, P.J., filed a dissenting opinion.

See also, 306 N.Y.S.2d 966

1. Arrest ⇐63

Warrantless arrest of defendant and another in motel was a "routine felony arrest" and was not made under "exigent circumstances," according, the arrest violated defendant's Fourth Amendment rights under retroactive application of Payton. U.S.C.A. Const.Amend. 4.

2. Criminal Law ⇐394.4(3)

Admissibility of a confession arising out of an illegal arrest involves a dual inquiry: first, causality, i.e., whether the accused's statement was the product of his own free will untainted by the official misconduct; and second, the purpose and flagrancy of the acts of the police, taking into account the underlying objectives of the exclusionary rule to deter lawless police activity and to preserve judicial integrity. U.S.C.A. Const.Amend. 4.

3. Criminal Law ⇐394.5(2)

Defendant failed to sustain his burden of proof that the search of his female companion's purse was illegal and that he had a legitimate expectation of privacy in it; consequently, he lacked standing to challenge the admissibility of evidence stemming from sale-depsoit box keys found in the purse; in any event, the search of the sale-deposit box and seizure of its contents were not unlawful, having been accomplished pursuant to a valid search warrant.

4. Criminal Law ⇐394.5(2)

Although defendant's arrest violated his Fourth Amendment rights, his ensuing confession was nonetheless admissible, since there was no causal connection between the confession and the illegal entry of motel room by the police; furthermore, the acts of the police were not so purposefully and flagrantly illegal as to require application of the exclusionary rule in order to deter official misconduct or to preserve judicial integrity. U.S.C.A. Const.Amend. 4.

5. Criminal Law ⇐394.5(2)

Defendant failed to sustain his burden of proof that the search of his female companion's purse was illegal and that he had a legitimate expectation of privacy in it; consequently, he lacked standing to challenge the admissibility of evidence stemming from sale-depsoit box keys found in the purse; in any event, the search of the sale-deposit box and seizure of its contents were not unlawful, having been accomplished pursuant to a valid search warrant

6. Criminal Law ⇐394.5(3)

Close temporal proximity of illegal action of the police to the giving of an incriminating statement is not per se determinative of a causal relationship between the two

7. Criminal Law ⇐394.5(2)

Although defendant's arrest violated his Fourth Amendment rights, his ensuing confession was nonetheless admissible, since there was no causal connection between the confession and the illegal entry of motel room by the police; furthermore, the acts of the police were not so purposefully and flagrantly illegal as to require application of the exclusionary rule in order to deter official misconduct or to preserve judicial integrity. U.S.C.A. Const.Amend. 4.

APPENDIX E

At a Term of the Appellate Divis
of the Supreme Court of the Sta
of New York, held in and for th
Third Judicial Department at th
Justice Building in the City of
Albany, New York, commencing on
the 4th day of September, 19

P R E S E N T :

HON. ROBERT C. MAIN,
Justice Presiding.
HON. JOHN T. CASEY,
HON. ANN T. MIKOLL,
HON. HOWARD A. LEVINE,
HON. NORMAN L. HARVEY,
Associate Justices.

x----------

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD JUDICIAL DEPARTMENT

x----------

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

RICHARD P. LUCAS,

Appellant.

ORDER

No. 4158

x----------

Appellant, RICHARD P. LUCAS, having appealed from a judgm
of conviction of the County Court of Sullivan County, rendered o
the 28th day of October, 1981, and said appeal having been pre-
sented during the above stated term of this Court, and having be
argued by CARL J. SILVERSTEIN, ESQ., of the SULLIVAN COUNTY LEGA
AID SOCIETY, INC., of counsel for appellant, and by STEPHEN F.
LUNCEN, Sullivan County District Attorney, of counsel for the

respondent, and after due deliberation, the Court having re
a decision on the 25th day of October, 1984, it is hereby

hereby

ORDERED, that the judgment be and the same hereby is

affirmed.

ENTER:

/s/ Michael J. Novack

Clerk

Dated & Entered: November 7, 1984.
A TRUE COPY:

Clerk

of October 15. The following day, October 16, the police learned from the Western Union office in Florida from which money had been sent to the Sawdusts, N. Y. area the address of a motel in Utica, Florida, which defendants had given to Western Union. It was further learned that Lucas and Graham had sent an additional money-gram each to the Sawdusts, N. Y. area.

It was also learned that defendants had registered at this motel under their own names in 2 rooms, but had given false addresses, and had also rented a car and motorcycle, that they had a large amount of money with them in traveler's checks.

On the 18th, the New York State Police officers met with officers of the Broward County Sheriff's department and a member of the Florida Division of Law Enforcement filled them in on all of the foregoing facts, including those earlier mentioned herein in dealing with probable cause for the automobile search warrant obtained in New Jersey, and a surveillance was maintained of the 2 motel rooms occupied by defendants.

The Florida police requested a teletype message from New York, directing defendants to departure. The New York police made such request by telephone, and also for an arrest warrant to be obtained in New York. The teletype message directing the arrest was received in Florida before 2:00 P.M. on the 19th. However it appears that although the officer in charge of the investigation in New York requested that an arrest warrant be obtained here, the same was not obtained until October 20. However, the officers believed that the warrant had been obtained and was in existence prior to the arrests.

Defendants and the 2 women with them returned to the motel rooms at 6:00 A.M. on the 19th. Believing them to be armed and with a seven day, the police waited until 8:00 A.M. when without warning or notice, the police officers simultaneously, with the use of a passkey to one room, and through an unlocked door to an adjoining room, entered both rooms with drawn guns and an officer with a towel wrapped around his arm as a precaution against the day, and arrested the defendants, who, together with the 2 women, were taken to the Sheriff's Department in Fort Lauderdale, where they arrived at 9:30 A.M. There was no fight in the room, it having been placed with a reservation a day or 2 earlier, nor any guns found.

Defendant Graham was given his full "Miranda" warnings 4 times, once in the motel room, upon arrival at the Sheriff's Department, before making his confession, and at the beginning of his confession, which was tape recorded. On 2 occasions, at 9:00 o'clock and 11:00 A.M., he signed written acknowledgments of having received these warnings and, as also did each of the communications of his tape recorded confession

[1] A typewritten transcript of defendant's confession was received in evidence at the hearing (which Graham subsequently refused to sign) and the Court listened in camera, to the tape recording of this confession (by stipulation). The Court is satisfied beyond a reasonable doubt that Graham knowingly, intelligently and voluntarily waived his right to remain silent and to counsel.

The confession, which took 45 minutes to take, was completed orally at 11:15 the same day as the arrest and in brief substance sets forth the following:

Lucas, who was his friend and drinking companion, and familiar with handling of the money's at Mid-Valley Petroleum, suggested the robbery of Chez Hilton to Graham who agreed to participate. On the 18th or 19th, they waited for the victim at the Inverted Lamb, held him up, Lucas ordering Hilton into Lucas' car, Graham following in Hilton's station wagon. They drove to a family county area where they abandoned Hilton's car, ordering Hilton into the trunk of the Lincoln. They then drove to another isolated area, Lucas and Graham discussing the fact that Hilton knew Graham as employee of Mid-Valley. Lucas insisting therefore, that they had to "take him

any." When the car was stopped, Graham opened the trunk, Hilton was ordered out, Graham hit him over the head knocking him down with a club, and while Hilton was on the ground, Lucas shot him in the head and body some several times until he was pumped, and then left the body of the victim there, left the murder scene, picked up the 2 women, disposed of the handgun used in the killing in a stream in New Jersey, etc. He told of taking the money, about Lucas' mistaking change from the charge law, he and Lucas placing most of the money in safety deposit boxes in 2 banks in New York, purchasing travelers checks, and leaving for Florida. He recounted the 2 women from any implication in or knowledge of said crimes

Lucas refused to make any statements to the police

On the 21st both men were taken before a Court in Florida and waived extradition to New York. Lucas after conferring with counsel which he had requested

It should be mentioned here that Graham testified in his own behalf at the hearing and claimed that he had been beaten by an officer from the New York State Police about 10:00 A.M. while in the Sheriff's office in Florida, and he confessed this only because of this beating. The Court is convinced that said claim is a pure fabrication, as Investigator Brody had little or no contact with him subsequent to the arrest and prior to the confession, Brody having remained at the motel after the arrests and removal of defendants escorting Florida Police to inventory the property found there. Also, Graham claimed marks on his torso from the alleged beating, having recently forgotten when he testified that when processed at the N.Y. State Police barracks upon his return he had been photographed front and rear, with absolutely no evidence of same, nor had he complained of any mistreatment by any other police officer nor to the Florida Court when he was brought before said court

The hearing also covered an unpleasant statement made by Lucas on the airplane trip back to New York. It is clear, even

prior eyewitness rather than a confession, and People v. Dorsky, 72 N.Y.2d 729, 536 N.Y.S.2d 728, 533 N.E.2d 675, beyond a reasonable doubt due to its substantiation of a confession the Court has found all facts proved beyond a reasonable doubt

At about midnight of October 12, 1975, one Cheryl E. Walton was reported missing by her wife. It was learned by the New York State Police that he had been employed by the Mid-Valley Packaging Corporation of Newburgh, New York, as a route sales supervisor, whose duties included collecting money from his attorney operated accounts, for his employer and depositing same each afternoon at about 1:00 P.M. in a night depository at a certain local branch bank.

The police learned from conversations effectuated that on the said date of October 12 he had made up the deposit, which included cash in four bags, and left for the nearby bank at a time which was between 1:00 o'clock and 1:15 o'clock P.M. on that date. He was not seen or heard from thereafter, and the said deposit in excess of $15,000 had not been made.

On October 15, 1975, his body was found in Sullivan County, with clear evidence that he had been the victim of foul play. He had been shot during 2 bullet holes 2 in the head and 1 in the back, and a blow to the head.

The vehicle used by the deceased, which belonged to his employer, was found abandoned in another location, with a change of license plates.

The police learned from one Gloria Fisher, who personally knew defendant Lance, that at about 1 o'clock P.M. on October 12, she had seen defendant Lance sitting in a Lincoln automobile with another unidentified person at the bank road where the deceased was to have made the deposit. She further also advised the police that defendant Lance had cohabited for a time with one Madeline Mead, employed at the Middletown Service Station, and that defendant Graham had also been employed at said service station. The police also learned from a Julia Tibbs that her sister, Sherry Ann Graham, another girl, Linda and another fellow, "Turbo"

The police also learned from employees of the Mid-Valley Packaging Corporation that Graham had left the same position with Mid-Valley Packaging Corporation at the aforesaid date of October 12, and had been found about 2 weeks earlier for taking home a deposit of approximately $2,000 without depositing same in the night depository at the same bank branch.

Julia Tibbs had also told the police that Graham possessed a handgun. Further inquiry disclosed that he had no permit for same.

The police were also advised that Graham was a gun buff and Graham was a gun buff.

The police also learned that the defendant Lance now has, and that they and the police Sherry Ann Graham had left the area in the evening or night of October 12.

The Georgia Sheriff had also advised the police that Lance, Sherry Ann Graham and one Roberta Holmes were together in the New York area and that Sherry Ann had a non-expiring waiting for her at the Newburgh Western Union office, subsequently learned to be the sum of $150, from one of the defendants in Florida.

Gloria Fisher had also advised the police that about a week earlier Lance had called her to obtain the keys to the safe at the Middletown Service Station, as he was in need of money, and that he was unable to get them. She returned and subsequently she received a telephone call from Lance telling her that if she told anyone of their conversation he would shoot her. On that same evening the said gas station was burglarized and money and cigarettes stolen.

Subsequently, the police learned that Georgia Sherry received a telephone call from Lance advising her not to reveal the whereabouts of the two defendants and the girls to anyone.

The police furnished a search for defendants and checked airports in the New York metropolitan area and located the 1974 Lincoln at the Gateway Motel in Newark, New

Jersey, near Newark Airport, during the early morning hours of October 17.

The Motor Vehicle Bureau confirmed that the car belonged to Lance. A footlocker at the motel obtained a photograph of Lance, and advised the police that he had been tipped with a paper bag containing about $800 in change. Three missing item change machine from the change box found in the company car driven by the deceased victim.

The police also learned that defendant Lance had an extensive arrest record with one or two convictions. The victims man found on his record included crimes of violence and the use of firearms.

A check made with the Motor Vehicle Bureau revealed that the Lincoln automobile owned by Lance was a 1974 model and its license plate number, which matched the plates on the car

Following the location of the automobile, it was placed under direct surveillance by the New York State Police, and that afternoon other New York officers arrived. Subsequently, at about 1:00 P.M. on the 17th, Investigators Chandler and Dunn, together with a member of the local prosecutor's office, appeared before a Supreme Court judge of the State of New Jersey and gave testimony, under oath before said judge in their application for a search warrant of the automobile. A transcript of said proceedings was received in evidence, showing that there was presented to the said Court judge, after which the Court placed the oral application on the record, the Court requiring or summarizing the facts giving rise to probable cause on the record

An issue was raised at the hearing as to whether the officers were aware during the crucial phase of the record, which contains most of the facts above-mentioned, or Investigator Chandler testified, when the initial discussion with the Court commenced all the record. Defense counsel were given the opportunity to confer with the New Jersey Court, and to call the judge as a witness to counteract the testimony of Investigator Chandler. Although one of the defendant's attorneys conferred with said judge he was not called

This Court finds beyond a reasonable doubt that all of the foregoing facts were had before the New Jersey Court, under oath, which is in the transcript in evidence. I find "I am satisfied that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that the automobile sought to be searched and seized has been unlawfully obtained as the proceeding has been established as the commission of the homicide, and evidence of the crime," and signed the search warrant (People's Exhibit 21A, p. 11)

A search of the car was then conducted by a New Jersey police officer with 2 New York State Police officers in attendance and assisting

It should be noted, parenthetically, that the reason the application for the search warrant was made by state troopers rather than by affidavit is rooted in the New Jersey statutory requirements, i.e., that the application was made on a Friday, at about 1:00 o'clock P.M., and that there was, therefore, insufficient time to prepare papers for the New York prosecutor's office and the probable unavailability of a judge on the weekend

The search of the Lance vehicle yielded miscellaneous papers belonging to defendants Graham and Lance and a blue knit cap, a rifle, shotgun shells, a box from the trunk area, and other items of property

All items of personal property found in the car, and the car itself, were inventoried and with the approval of the New Jersey Court, removed to New York State Police headquarters in New York

A check with the airlines in Newark revealed that a "Mr. and Mrs. Richard Graham" had a "Mr. and Mrs. Richard Graham" had departed on a 2:05 P.M. flight from Newark to Fort Lauderdale, Florida, on October 11. The police also learned that defendants had a Doberman Pinscher dog with them

A number of New York State Police officers flew to Fort Lauderdale on the night

occupants of this house were detained (*Rawlings v. Kentucky*, 448 U.S. 98, 107, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 *supra*).

Thus, in determining that there was no causal relationship, the court in *Rawlings* found critically significant that during the illegal detention of defendant and his companions they were free to engage in normal activities inside the house and the police used no force upon their persons (*id.* at 108, 100 S.Ct. at 2563).

[4] Applying the foregoing analysis to the facts of the instant case, we have no hesitancy in upholding defendant's confession. To be kept foremost in mind is that under *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639, *supra*, what rendered the arrest in the instant case illegal was not the seizure of defendant's person, but the illegal entry into his motel room to effect that seizure. *Payton* casts no doubt on the continued validity of a warrantless public arrest upheld in *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598. Therefore, in applying the refinements of causality analysis required by *Rawlings*, the focus here has to be on the existence or nonexistence of a causal connection between defendant's confession and the *illegal entry*. Purely and simply, there is nothing whatsoever in the record to connect defendant's self-incrimination with the earlier entry of the police into the motel. This is not a situation where defendant incriminated himself immediately after police burst into his room. To the contrary, defendant only confessed several hours later at the Broward County Sheriff's Office, after he had been advised of his *Miranda* rights no less than four times, and three times in writing or recorded orally had acknowledged having been advised of them and expressly waived them. In short, the conclusion is inescapable that the actual circumstances and police conduct giving rise to defendant's confession were the same here as they would have been had defendant lawfully been arrested outside his motel room rather than inside. The confession is thus demonstrably untainted by the entry retroactively condemned by *Payton* and *United States v. Johnson*, 457 U.S. ——, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) *supra*). The case for admissibility is even stronger when we turn to the second facet of the *Wong Sun-Brown-Rawlings* test, that of the purpose and flagrancy of the police misconduct. This is not a case where the police entered defendant's motel room on an "expedition for evidence in the hope that something might turn up" as in *Brown*, or even one where they acted under an erroneous impression of the legality of their conduct as in *Rawlings*. Here, the police acted in a manner that was valid under the then prevailing statutory law of the country and which had been judicially upheld in New York and Florida (see *Payton v. New York*, 445 U.S. 573, 598–600, 100 S.Ct. 1371, 1386–1387, 63 L.Ed.2d 639, *supra*). Moreover, they acted under the honest, reasonably held belief that a warrant for defendant's arrest had been issued, which if accurate, would have rendered their conduct constitutionally valid under the higher requirements for nonpublic arrests created some five years later in *Payton* and applied retroactively seven years later in *Johnson*. Surely then, the acts of the police in the instant case were not so purposefully and flagrantly illegal as to require application of the exclusionary rule in order to deter official misconduct or to preserve judicial integrity. Consequently, defendant's confession was properly admitted at his trial. In so ruling, we are not unmindful of our dictum in defendant's earlier appeal that "if the arrest was defective the subsequent confession could not be admitted because the connection between the arrest and the inculpatory statement had not yet become so attenuated as to dissipate the taint" (*People v. Graham*, 69 A.D.2d 544, 547, 419 N.Y.S.2d 290, *supra*). Our earlier decision was rendered before *Rawlings*, when *Wong Sun* and *Brown* could reasonably have been read as attaching special significance to the temporal proximity between the arrest and the confession. As our previous discussion of *Rawlings* demonstrates, however, such temporal proximity can no longer be considered determinative. Just as the prosecution is burdened here with the result of the development in the constitutional law of arrest effected by *Payton* and *Johnson*, so, too, are the People entitled to the similarly subsequent refinements in the application of the exclusionary rule to this fact pattern enunciated in *Rawlings*. Accordingly, the original ruling denying the motion to suppress defendant's confession need not be disturbed.

[5] We next turn to the various items of tangible evidence that were the subject of the suppression hearing, but only insofar as previous rulings upholding their admissibility must be reconsidered in the light of *Payton*. As to the keys to the safe-deposit box in Newark, New Jersey, containing the cash proceeds of the crime, the record of the suppression hearing establishes that the defendant gave the keys to his female companion, Roberta Holmes, and that they were in her purse and the purse was in her possession when the police entered the motel room. The evidence supports the suppression court's finding that she had no objection to the police taking the keys (*People v. Graham*, 90 Misc.2d 1019, 1027, 396 N.Y.S.2d 966). Defendant never told her what the keys were for or that she was to withhold them from anyone else. On the basis of these facts, defendant has failed to sustain his burden of proof that the search of Holmes' purse was illegal and that he had a legitimate expectation of privacy in it; consequently, he lacked standing (*Rawlings v. Kentucky*, 448 U.S. 98, 104–105, 100 S.Ct. 2556, 2561–2562, 65 L.Ed.2d 633, *supra*; *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619; *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387). It is also noteworthy that, based upon the same record at the joint suppression hearing, the Court of Appeals in *People v. Lucas*, 53 N.Y.2d 678, 681 n., 439 N.Y.S.2d 99, 421 N.E.2d 494, held that since the purse was searched while in Holmes' possession, codefendant Lucas had no standing to challenge the legality of the search. By the same reasoning, defendant could not legitimately have expected the contents of the safe-deposit box to have remained private. In any event, however, the search of the safe-deposit box and seizure of its contents were not unlawful, having been accomplished pursuant to a valid search warrant obtained by the police on the basis of information contained in defendant's confession and their follow-up investigation (see *People v. Graham*, 90 Misc.2d 1019, 1026–1027, 396 N.Y.S.2d 966, *supra*).

[6] We next consider the legality of the search of the trunk lid of codefendant Lucas' car from which the victim's fingerprints were taken on October 20, 1975. The vehicle had been seized, pursuant to a valid search warrant, three days earlier from a public motel parking garage near the Newark airport. An initial search was made which did not reveal the fingerprints. Clearly, at the time of the seizure defendant had no property or possessory rights to Lucas' vehicle or its trunk, nor did he have any such rights at the time of the October 20 search when, additionally, the police had lawfully acquired possession under the search warrant. Thus, defendant also lacked standing to contest the legality of that search (*Rakas v. Illinois*, 439 U.S. 128, 148–149, 99 S.Ct. 421, 433–434, 58 L.Ed.2d 387, *supra*; *People v. McChesney*, 81 A.D.2d 927, 439 N.Y.S.2d 502). Apart from standing, even if we were to hold that the police had exhausted their authority to search under the warrant by the initial search of the vehicle, new probable cause for the second search was established from defendant's confession, and the second search may therefore be upheld under *United States v. Ross*, — U.S. —, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

[7] The only remaining items requiring consideration are those seized at the motel following defendant's arrest. As described in *People v. Lucas*, 53 N.Y.2d 678, 681, 439 N.Y.S.2d 99, 421 N.E.2d 494, *supra*, they consisted of briefcases of defendant and Lucas, receipts for travellers' checks, and several Western Union receipts for money orders. Unquestionably, all of these items should have been suppressed, both under *Payton* and because the search leading to

their discovery was "overbroad" (*People v. Lucas*, *supra*, 53 N.Y.2d p. 681, 439 N.Y.S.2d 99, 421 N.E.2d 494). On defendant's initial appeal to this court, we recognized the possible illegality of the search, but nevertheless held that any error must be considered harmless (*People v. Graham*, 69 A.D.2d 544, 548, 419 N.Y.S.2d 290, *supra*). Upon the present reconsideration of the record, we adhere to that determination. The tainted evidence was of minimal probative value. The admissible evidence constituted overwhelming proof of defendant's guilt, consisting of defendant's flight and the other factors upon which probable cause for the arrest was based (see *People v. Graham*, 90 Misc.2d 1019, 1021–1024, 396 N.Y.S.2d 966, *supra*), defendant's 14-page confession in which he totally inculpated himself, the victim's fingerprints on Lucas' vehicle and defendant's fingerprints on his safe-deposit box containing more than $10,000 of the proceeds of the crime. Under these circumstances, there is no reasonable possibility that the erroneous admission of the items seized at the motel contributed to defendant's conviction, and therefore, the failure to suppress such evidence was harmless beyond a reasonable doubt (*People v. Sanders*, 56 N.Y.2d 51, 66–67, 451 N.Y.S.2d 30, 436 N.E.2d 480; *People v. Etoll*, 51 N.Y.2d 840, 841, 433 N.Y.S.2d 750, 413 N.E.2d 1165; *People v. Almestica*, 42 N.Y.2d 222, 225–227, 397 N.Y.S.2d 709, 366 N.E.2d 799).

On the basis of the foregoing, we conclude that the retroactive application of *Payton v. New York (supra)* does not require a different result from that reached on defendant's initial appeal. The judgment of conviction, as modified on that appeal (*People v. Graham*, 69 A.D.2d 544, 549, 419 N.Y.S.2d 290, *supra*) should therefore be affirmed.

The judgment should be modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

KANE, Justice (concurring).

While I am in complete accord with the legal conclusions set forth in the well-reasoned opinion of Justice Levine, I suggest there may be additional reasons which support an affirmance.

To be remembered is the fact that this case has been remanded to us "for further consideration in light of *United States v. Johnson*, 457 U.S. [——, 102 S.Ct. 2579, 73 L.Ed.2d 202] (1982)" by the United States Supreme Court. *Johnson* presented the question "whether the rule announced in *Payton* applies to an arrest that took place before *Payton* was decided." The court resolved the question by applying the *Payton* rule to all cases pending on direct appeal at the time *Payton* was decided. Thus, while we are now instructed that a warrantless and nonconsensual entry at a home cannot be made to effect a routine felony arrest, absent exigent circumstances, the underlying question, never directly addressed by this court when the matter was before us on two other occasions, is, in my view, whether the rule in *Payton* applies to the rather unusual factual circumstances of this case. A detailed description of those facts is reported in *People v. Graham*, 90 Misc.2d 1019, 396 N.Y.S.2d 966. Reference thereto (*id.* at 1024, 396 N.Y.S.2d 966) establishes, and it is not controverted, that at the time of the entry and arrest of Graham, the police officers had applied for a fugitive arrest warrant, and were informed one had been issued. Moreover, they were in possession of a teletype message to that effect, a written instrument which police authorities historically have acted upon while in foreign jurisdictions, and which is acknowledged to be routine police procedure.

Thus, although I am not suggesting that a "good faith exception" should be made to the application of the exclusionary rule to alleged improper police conduct, for, indeed, I fail to discern any improper conduct by the police officers in this case, the question of the good faith of the police officers becomes extremely significant when considering this matter "in light of *United States v. Johnson*, 457 U.S. [——, 102 S.Ct. 2579, 73 L.Ed.2d 202] (1982)." *Johnson* reviewed,

extensively, the Government's argument that arresting officers should be charged only with knowledge of and good faith compliance with prevailing constitutional requirements. In rejecting such argument, the court pointed out that it had long emphasized the fact that "police officers should resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant" (*United States v. Johnson*, *supra*). This is the lesson of *Payton* with which we are concerned. It is the court's resolution of that narrow issue which was presented to it (*Payton v. New York*, 445 U.S. 573, 582, 100 S.Ct. 1371, 1377, 63 L.Ed.2d 639). The mere fact that a teletype message rather than a warrant was in the officers' hands at the time of arrest should not abort their actions which were, in fact, in accordance with constitutional norms in existence at the time, although not officially articulated until six years later[3]. If *Payton* did not announce any new principle of law (*United States v. Johnson*, *supra*), what police conduct in this case is so improper that repetition thereof should be prohibited by imposition of the exclusionary rule? It is my view that no constitutional principle was offended in this case by the conduct of the arresting officers, and that any administrative delay in issuance of a warrant of arrest some 1,300 miles from the scene should not transform the constitutionally clairvoyant conduct of the arresting officers into a violation of a defendant's rights.

MAHONEY, Presiding Justice (dissenting).

While we agree with the majority's conclusion that defendant's arrest was violative of his Fourth Amendment rights upon retroactive application of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639, we disagree with that portion of the statement which holds that the illegal arrest does not compel suppression of defendant's confession. We would adhere to the language in our original decision on defendant's appeal which, albeit in dictum, stated:

Of course, if the arrest was defective the subsequent confession could not be admitted because the connection between the arrest and the inculpatory statement had not yet become so attenuated as to dissipate the taint (citations omitted).

(*People v. Graham*, 69 A.D.2d 544, 547, 419 N.Y.S.2d 290.) Since the confession is inadmissible in our view, we also disagree with the majority's conclusion that the failure to suppress certain items of physical evidence which were seized from the Florida motel rooms was harmless beyond a reasonable doubt. Without the confession, it cannot be said that there is no reasonable possibility that the erroneous admission of the items seized at the motel contributed to defendant's conviction (see *People v. Sanders*, 56 N.Y.2d 51, 67, 451 N.Y.S.2d 30, 436 N.E.2d 480; *People v. Crimmins*, 36 N.Y.2d 230, 237, 367 N.Y.S.2d 213, 326 N.E.2d 787).

Accordingly, we would reverse defendant's conviction on all four counts, reinstate the entire indictment, and remit the case for a new trial.

91 A.D.2d 716

In the Matter of Raymond T. FINNAN, Respondent-Appellant,

v.

Arthur LEVITT, as Comptroller of the State of New York, et al., Appellants-Respondents,

and

Richard J. Hartlett, as State Administrative Judge, et al., Respondents.

Supreme Court, Appellate Division, Third Department.

Dec. 9, 1982.

Cross appeals were taken from order of the Supreme Court at Special Term, Albany

3. It should be noted that under recent amendments to the Criminal Procedure Law, a search warrant can be obtained upon application to a judge by telephone (see L. 1982, ch. 679, eff. Sept. 20, 1982).

APPENDIX H

to appear before the Grand Jury or, in the absence of accession to that right, to have the indictment dismissed. The defendant moved on appropriate papers on July 18, 1977 to dismiss the first indictment, the very day attorney Neidl was assigned to represent him, and Neidl acquiesced in the motion. Thereafter, defendant's attitude that he wanted to testify never changed, as evidenced by his frequent renewals of his motion to dismiss. Yet, defense counsel, without authority, informed the District Attorney, on August 15, 1977, that defendant had waived his right to appear before the Grand Jury upon the resubmission. Accordingly, the court dismissed defendant's motion four days before trial was commenced.

I conclude that attorney Neidl, knowing his client's state of mind with respect to his right to appear before the Grand Jury, had a duty on August 12, 1977 to inform defendant of the resubmission and ascertain his final position while there was still sufficient time for defendant to demand and be afforded the opportunity to appear before that body. His failure to discharge that duty effectively deprived defendant of his constitutional right of the assistance of counsel, and, since the lack of such assistance deprived defendant of an opportunity to have the superseding indictment dismissed, it constituted error that cannot be deemed harmless (*People v. La Brec, supra*). While errorless representation is not required, minimally the assistance of counsel must be susceptible of being deemed of an assistive nature (*Brubaker v. Dickson*, 9th Cir., 310 F.2d 30, 37).

The indictment should be dismissed (CPL 190.50, subd. 5, par. [c]). However, paragraph 4 of CPL 210.20 provides that if an indictment is dismissed upon any of the grounds specified in paragraphs (a), (b) and (c) of CPL 210.20 (subd. 1), the court may, upon application of the People, in its discretion, authorize the People to submit the charge or charges to the same or another Grand Jury. Paragraph (c) of CPL 210.20 (subd. 1) provides for indictment dismissal upon the ground that "[t]he grand jury proceeding was defective, within the meaning of section 210.35 * * *", and CPL 210.35 (subd. 4) provides that a grand jury proceeding is defective when "[t]he defendant is not accorded an opportunity to appear and testify before the grand jury in accordance with the provisions of section 190.50 * * *".

The judgment should be reversed, the indictment dismissed and the matter remitted with leave to the People to resubmit to same or another Grand Jury.

69 A.D.2d 544

The PEOPLE of the State of New York, Respondent,

v.

Richard B. GRAHAM, Appellant.

Supreme Court, Appellate Division, Third Department.

July 26, 1979

Defendant was convicted in County Court, Sullivan County, Louis B. Scheinman, J., of two counts of murder in the second degree, kidnapping in the first degree and robbery in the first degree. Defendant appealed. The Supreme Court, Appellate Division, Mahoney, P. J., held that (1) there was probable cause to justify a warrantless arrest of defendant in a motel room in Florida; (2) police failure to give notice of their authority prior to entry to make the arrest was not unlawful where the safety of the arresting officers might otherwise have been endangered; and (3) the kidnapping charge merged with the robbery since the abduction did not exceed 12 hours before the victim died and because it was incidental to and inseparable from the crime of robbery and the predicate felony was included in the felony-murder conviction.

Affirmed as modified.

1. Searches and Seizures ⇐7(10)

Motel room is entitled to same protection under Fourth Amendment as is home. U.S.C.A.Const. Amend. 4.

2. Arrest ⇐68

Under New York and Florida laws, warrantless entry to make felony arrest is permissible if based on probable cause.

3. Arrest ⇐63.4(18)

In prosecution for murder, kidnapping and robbery, record established that there was sufficient probable cause to justify warrantless arrest of defendant in motel room.

4. Arrest ⇐68

Failure of police to give notice of their authority prior to entering motel room to make warrantless arrest was not unlawful, in that police knew that defendant and his companions had taken Doberman pinscher with them when they fled, and it was reasonable for police to believe the defendant, a fugitive from homicide in which the murder gun was still missing, might be armed. CPL 120.80, subd. 4, 140.15, subd. 4; West's F.S.A. §§ 901.17, 901.19(1).

5. Criminal Law ⇐1166(1)

Warrantless search of defendant's motel room conducted after his arrest did not require reversal of murder conviction, even if search was improper, in light of overwhelming case against defendant once his confession was admitted, and minimal prejudicial impact of fruits of any improper search.

6. Searches and Seizures ⇐3.7

Warrant authorizing search for "other evidence of a homicide" was not an unconstitutional general warrant. U.S.C.A. Const. Amend. 4.

7. Criminal Law ⇐303

Since participation in enumerated predicate felony is requisite of crime of felony-murder, if defendant is convicted of felony-murder predicate felony must be dismissed. Penal Law § 125.25, subd. 3.

8. Homicide ⇐18(5)

Because kidnapping charge merged with robbery, since abduction did not exceed 12 hours before victim died, and because it was incidental and inseparable from crime of robbery, predicate felony of robbery was included in felony-murder conviction. Penal Law § 125.25, subd. 3.

Stephen L. Oppenheim, Monticello, for appellant.

Joseph Jaffe, Dist. Atty., Monticello (Stephen Lungen, Special Counsel, Liberty), for respondent.

Before MAHONEY, P. J., and SWEENEY, KANE and HERLIHY, JJ.

MAHONEY, Presiding Justice.

A complete recitation of the facts can be found in the reported decision on the defendant's pre-trial suppression motion (*People v. Graham*, 90 Misc.2d 1019, 396 N.Y.S.2d 966). Briefly, Craig R. Mitton, who collected daily revenues from service stations for his employer, Mid-Valley Petroleum Corporation of Newburgh, New York, disappeared after leaving company offices late in the afternoon of October 13, 1975 to make a deposit. His body, bearing three bullet wounds and marks of a blow to the head, was discovered in Sullivan County two days later. Over $25,000 in collections were missing. By the evening of October 18, the police had learned that the defendant, Lucas and two women were registered in rooms 307 and 308 of the Airport Travel Motor Lodge in Dania, Florida. The rooms were empty when the police arrived and surveillance was continued throughout that night. At approximately 6:00 A.M. the next morning, the defendant and his party returned to their rooms. Due to a misunderstanding in communications with State Police headquarters in Middletown, New York, the State Police officers assisting the Broward County Sheriff's office in the investigation and arrest believed that a warrant had been issued for defendant's arrest at 7:00 P.M., October 18, in New York. Therefore, at 8:00 A.M., on October 19, the

the defendant and his companions had taken a Doberman Pinscher with them to Florida. In fact, one of the arresting officers had wrapped a towel around his arm prior to the entry for protection against the anticipated attack by this animal. Furthermore, it was reasonable for the police to believe that defendant, a fugitive from a homicide in which the murder gun was still missing, might be armed. Therefore, defendant's objection to the noticeless entry is without merit.

[5, 6] Assuming the warrantless search of defendant's motel room conducted after his arrest was improper (see *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685; *People v. Evans*, 43 N.Y.2d 160, 165, 400 N.Y.S.2d 810, 812, 371 N.E.2d 528, 530), in light of the overwhelming case against him once his confession had been admitted, and the faint prejudicial impact of the fruits of the improper search, the error must be considered harmless (see *People v. Crimmins*, 36 N.Y.2d 230, 240-241, 367 N.Y.S.2d 213, 220-221, 326 N.E.2d 787, 793-794; cf. *People v. Grant*, 45 N.Y.2d 366, 378-379, 408 N.Y.S.2d 429, 436-437, 380 N.E.2d 257, 264-265). Defendant also maintains that items seized from Lucas' vehicle should have been suppressed because the warrant was defective. Even if defendant had standing to make such a challenge (see *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387), the warrant issued for the search of Lucas' Lincoln Continental in New Jersey was not fatally vague. It authorized a search for "other evidence of a homicide" and because it so limited the scope of the search to one particular crime it cannot be considered an unconstitutional general warrant (see *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627. See also *Lo-Ji Sales, Inc. v. State of New York*, — U.S. —, 99 S.Ct. 2319, 60 L.Ed.2d 920 [1979]). Therefore, this evidence was properly admitted.

[7, 8] Defendant's remaining complaints of illegal police activity are not persuasive. However, two issues affecting sentencing remain. Defendant asserts that since he was convicted of felony murder, the kidnapping and robbery charges should have been dismissed as lesser included offenses. Since participation in one of the enumerated predicate felonies (see Penal Law, § 125.25, subd. 3) is a requisite of the crime of felony murder, if the defendant is convicted of felony murder, the predicate felony charge must be dismissed (*People v. DeGata*, 64 A.D.2d 929, 407 N.Y.S.2d 916; lv. to app. den. 45 N.Y.2d 841; *People v. Barnes*, 60 A.D.2d 654, 400 N.Y.S.2d 558; cf. *People v. Shuman*, 37 N.Y.2d 302, 305, 372 N.Y.S.2d 60, 62, 333 N.E.2d 363, 365. But see *People v. Nichols*, 230 N.Y. 221, 225-226, 129 N.E. 883, 884; cf. *People v. Perez*, 45 N.Y.2d 204, 408 N.Y.S.2d 343, 380 N.E.2d 174). In addition, the kidnapping charge merged with the robbery since the abduction did not exceed 12 hours before the victim Mitton died, and because it was incidental to and inseparable from the crime of robbery (see *People v. Smith*, 47 N.Y.2d 83, 416 N.Y.S.2d 784, 390 N.E.2d 291; *People v. Cassidy*, 40 N.Y.2d 763, 390 N.Y.S.2d 45, 358 N.E.2d 870). Mitton was only abducted in order to get the money he was carrying. Therefore, since the kidnapping charge merged into robbery, only one predicate felony survived, and it must be considered included in the felony murder conviction. The judgments imposed for conviction of kidnapping in the first degree and robbery in the first degree must necessarily be vacated.

The judgment should be modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

Judgment modified, on the law and the facts, by reversing the convictions of kidnapping in the first degree and robbery in the first degree and dismissing the counts of the indictment therefor, and, as so modified, affirmed.

(1)

APPENDIX I

STATE OF NEW YORK
COUNTY OF SULLIVAN
COUNTY COURT

---------- x Indictment No. 67 75
PEOPLE OF THE STATE OF NEW YORK,

-against-

RICHARD B. GRAHAM and
RICHARD P. LUCAS

Defendants.

---------- x

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of MICHAEL L. ZAGER, ESQ., sworn to the 24th day of February 1976, and the exhibits attached and upon all the pleadings and proceedings had herein, the undersigned will move this Court located in the Village of Monticello, County of Sullivan and State of New York, on the 15th day of March 1976, at 2 o'clock for an Order or Orders granting the defendant the following forms of relief:

1. For an Order directing the District Attorney to serve and file a Bill of Particulars, pursuant to Section 200.90 of the Criminal Procedure Law of the State of New York for all items set forth in Part I of the annexed affidavit.

2. For an Order granting Discovery and Inspection pursuant to Section 240.20 of the CPL of all matter sought in Part 2 of the annexed affidavit.

3. For an Order directing the District Attorney to

produce to the defendant, all exculpatory material or other evidence favorable to the defendant as is set forth in Part 3 of the annexed affidavit.

4. For an Order granting an inspection of the Grand Jury Minutes and dismissing the Indictment herein, as is set forth in Part 4 of the annexed affidavit.

5. For an Order granting a hearing pursuant to section 510.20 of the Criminal Procedure Law to determine an application for bail.

6. For an Order granting a separate trial for the defendant, RICHARD P. LUCAS, pursuant to Section 200.40 of the Criminal Procedure Law.

7. For an Order pursuant to Section 710.20(1) of the Criminal Procedure Law granting the suppression of tangible property, which evidence the District Attorney intends to offer against the defendant on the grounds that such evidence was obtained by means of an unlawful search and seizure.

8. For an Order pursuant to Section 710.20(3) of the Criminal Procedure Law granting the suppression of any and all statements attributed to the defendant which are intended to be offered against the defendant at the trial on the grounds that such statements were involuntarily given.

9. For such other and further relief as to the Court may seem just and proper, including such hearing or hearings as may be required therefore.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 2214 of the Civil Practice Law and Rules, answering affidavits, if any, should be served at least five (5) days prior to the return date of this motion.

Yours, etc.,
MICHAEL L. ZAGER, ESQ.
Attorney for defendant
LEGAL AID SOCIETY OF SULLIVAN COUNTY INC.,
26 Landfield Ave.
Monticello, New York 12701
(914) 794-4094

To: EMANUEL GELLMAN
District Attorney of Sullivan County
Court House
Monticello, New York 12701

Rcd 5/1/83 cs

APPENDIX J

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

THE PEOPLE OF THE STATE OF NEW YORK,

-against- SENTENCING

RICHARD P. LUCAS,

Defendant.

BEFORE: HON. LOUIS B. SCHEINMAN, Sullivan County Judge

APPEARANCES: STEPHEN F. LUNGEN, SPECIAL PROSECUTOR
Sullivan County Court House
Monticello, New York 12701
Attorney for the People

LEGAL AID SOCIETY OF SULLIVAN COUNTY, INC.
26 Landfield Avenue
Monticello, New York 12701
BY: CARL J. SILVERSTEIN, ESQ., Of Counsel
Attorney for the Defendant

Defendant in Person

STENOGRAPHIC MINUTES OF PROCEEDINGS

Sullivan County Court House
Monticello, New York

ALBEE E. ROCHMAN
Official Court Reporter

OCTOBER 28, 1981

Date: October 28, 1981
Time: 9:30 A.M.

THE COURT: Mr. Silverstein, have you seen the pre-sentence report?

MR. SILVERSTEIN: Yes, Your Honor. But before we proceed on the sentencing, I have a motion returnable this morning to have you disqualified from sentencing Mr. Lucas.

THE COURT: I have read the motion papers. Mr. Lungen just submitted opposing papers. Do you wish to offer any argument with respect to that motion?

MR. SILVERSTEIN: I don't think it would be - - the argument is contained in the papers, Your Honor.

THE COURT: My own feeling is that the motion has so little merit that it requires no comment by myself and is just denied.

MR. SILVERSTEIN: Your Honor, I have read the probation report and I make an application to correct that probation report in that the legal history contained in the probation report contains multiple number of arrests without convictions and - -

THE COURT: You know from your own experience,

Mr. Silverstein, that I never consider arrests where there are no convictions.

MR. SILVERSTEIN: That was my application.

THE COURT: Anybody can be arrested by mistake. If there is no conviction, the arrest doesn't mean anything.

MR. SILVERSTEIN: The next application is directed to the probation department to furnish you with a legal history which only contains convictions and physically deletes those arrests.

THE COURT: I don't think it is necessary.

MR. SILVERSTEIN: Your Honor knows those papers go to the Parole Board and if they are prejudicial to the defendant and don't belong in there, they should not go to the Parole Board.

THE COURT: Well, I am not going to direct them to do that. It seems to me that the Parole Board should have, in this respect, the same understanding and same training that I have had. And that is to totally and completely disregard records of arrests which did not culminate in convictions. It should be meaningless to the Parole Board just as they are to me.

MR. SILVERSTEIN: I should like to submit an order to be sent up to the Parole Board where this Court states those arrests will not be considered.

THE COURT: I have no objection signing that type of order except I am wondering whether it would be a proper thing for me to do. Let's think about it for a minute.

MR. SILVERSTEIN: It is supposed to be pursuant to statute.

THE COURT: Why don't you make an order as follows. This would be better. I can't order the probation department what to do. I doubt if I have that jurisdiction. Why don't you make this type of order. Make an order saying that this Court, that I have disregarded all statements in the legal history of the defendant which indicates that he was arrested on one charge or another and do not indicate any conviction and that this Court - - I have not paid any attention to any of those records. Because in my opinion, it would be improper for me to do so. I think that sends a message to the Parole Board. At the same time, I doubt very much I have the authority to tell the Parole Board what to do. That's my problem. I think you can accom-

plish the same purpose by submitting that type of order I just submitted and I will sign that type of an order for you and you can send that along. See that it is sent along with the papers.

MR. SILVERSTEIN: Mr. Lungen wants that on notice.

THE COURT: It does not have to be on notice. I am authorizing you to do that without notice.

MR. LUNGEN: I have no objection anyhow.

THE COURT: All right.

MR. SILVERSTEIN: Finally, Your Honor, some comments by the writer of the probation report in which he claims Mr. Lucas has tendancies toward assaultive behavior and was indicated by five arrests on assault charges. That statement is unfair, prejudicial, by reason of the fact it's five arrests without convictions.

THE COURT: Well, there is one Breach of Peace, Resisting Arrest in Milford, Connecticut where he was sentenced to the reformatory and then there was a Disorderly Person, five days; then there was an aggravated assault and the sentence length was not reported. Fairfield St. Jail. That would be state jail. Of course, it cannot be based,

again, let me say, it cannot be based upon any arrests which did not culminate in convictions. I don't know how many times I have to repeat it for you, Mr. Silverstein. I just won't consider any arrests which did not culminate in conviction. It is meaningless to me. You know, I have been arrested. I was arrested twice in the Army. Once for being dropped off in Newport News, Virginia for hitchhiking to town and being dropped in a restricted area. I did not know it was restricted. The M.P. picked me up. I was arrested. Does it make me a criminal? The second time, after I was discharged, coming back from Florida with my folks, I was still wearing Eaki's and I was arrested for being out-of-uniform and had to get my discharge papers out of the trunk of the car to prove I was no longer in the army. So there were two arrests I was subjected to. It didn't make me a criminal. Personal experience, I can say arrest without convictions don't mean anything.

MR. SILVERSTEIN: Now, I was commenting on the paragraphs by Mr. Kelly where he claims that the arrests are indicative of assaultive behavior.

THE COURT: Some are because they resulted

in convictions.

MR. SILVERSTEIN: If you will notice those assaultive behaviors are more than twenty-five years with exception to the one in 1973, a fifty dollar fine and that was explained on the trial accurately.

THE COURT: I don't know how well it was explained.

MR. SILVERSTEIN: It had no stand on what he was convicted for here.

THE COURT: Let me say this. This whole subject you are now discussing has nothing to do really with my sentencing. My sentencing in this case is from everything I have seen in the probation report, from everything I have heard upon the trial, and is based upon the nature of the crime in this case.

MR. SILVERSTEIN: Your Honor also has the three reports from the corrections department.

THE COURT: Letters, yes. I read the letters from the people in the corrections department who have - -

MR. SILVERSTEIN: I point out Mr. McKay, the law library coordinator, the head official for law libraries for the entire correctional system.

THE COURT: That may very well be. I will tell you frankly, and you might as well have the benefit of my thinking, I am not trying to keep anything below the record, and that is I have expressed my thoughts at the last sentencing and my thoughts are basically the same and that is the aggravated nature of this crime is such that if there were a capital punishment statute, that I think there should be, this would be the typical case that would warrant capital punishment. And you know, when you have capital punishment, you have very little opportunity for rehabilitation. Wouldn't you say so?

MR. SILVERSTEIN: I think this is a factious argument. I won't even answer that.

THE COURT: Anyway, you know how I feel.

MR. SILVERSTEIN: If it please the Court - -

THE COURT: To my mind, the punishment here should be based upon retribution rather than any thought of rehabilitation of the terribly, terribly aggravated nature of this crime. That's my thinking on the subject.

MR. SILVERSTEIN: I will have my chance at

allocution, Your Honor.

THE COURT: Certainly. We are not proceeding with the sentencing yet.

MR. SILVERSTEIN: I am ready to proceed.

THE COURT: All right. Will the Clerk please take a brief pedigree.

(Pedigree of the defendant taken by the Clerk of the Court.)

THE COURT: Mr. Lungen?

MR. LUNGEN: Yes, Judge. May it please the Court, the defendant stands before this Court convicted after trial by a Sullivan County Jury on October 7, 1981, for the crimes of intentional murder of Craig R. Mitton and felony murder. Briefly, the evidence at the trial proved, beyond a reasonable doubt, that this defendant, Richard P. Lucas, along with his co-defendant, Richard B. Graham, planned the crimes in advance, forceably abducted Craig R. Mitton, placing him in the trunk of the Lucas car while still alive, forceably stealing $25,000.00 in cash from him. And after robbing and kidnapping Mr. Mitton, they murdered him by shooting him three times at extremely close range for the sole purpose of eliminating the only

eye witness. The evidence further proved that these defendants left Craig R. Mitton to die in the deserted wood area of the Brookhaven Bungalow Colony in Bloomingburg, New York; that they then divided up the stolen money into equal shares and they fled the area winding up in Florida on a "vacation trip" and spending spree with this stolen blood money. The Court is fully aware of all of the evidence against this defendant, so no greater detail is required.

The taking of a human life for the value of $25,647.19 is an act that cannot and must not go unanswered. The crimes committed by this defendant are the most horrible, most horrendous acts that a person can commit in our society. The murder of Craig R. Mitton was a useless and senseless act of violence and was deliberately performed in order to silence him. His murder was not necessary.

This defendant, Richard P. Lucas, is not a stranger to violence or to the criminal courts. He has a criminal record dating back from his youth with numerous arrests for assaults, burglary, stealing and the like. Additionally, his reputation in the community where he lived was one of violence.

Our courts have spend alot of time arguing over and expanding the rights of criminal defendants in an honest attempt to uphold the Constitution of the United States. I have always agreed that these rights must be preserved. But on the same token, there must be an equal commitment and balance to the rights of the victims of these crimes for the proper protection of society to enjoy life, liberty, and the pursuit of happiness as the Constitution guarantees.

In this regard, the defendant has violated the most sacred right of all - - the right to life. He has shown no remorse for his conduct. He deserves no leniency whatsoever by this Court. He should be dealt with in the harshest possible terms that are permissable under the laws of the State of New York.

Under the facts of this case, such a deliberate killing requires a review by our legislature for the enactment of a capital punishment statute. The purpose for such punishment would not necessarily be one of deterrence but rather for retribution and justice. If capital punishment deters one murder, saves one policeman's life, then it has truly been effective. Under our system of law, the likelihood

of an innocent defendant being sent to death will just not occur. Our laws are so liberal regarding the rights of defendants and the amount of appeals that they can take, that it virtually eliminates such a possibility from occurring. The People of the State of New York must show their outrage to these most heinous of crimes if criminals are ever going to learn that the pursuit of such criminal behavior will not be tolerated in this society. A capital punishment statute is such a demonstration.

Under the foregoing circumstances, and within the framework of existing New York Law, and in the name of the People of the State of New York, I recommend that this Court sentence the defendant, Richard P. Lucas to the maximum sentence permitted for each count of murder, the maximum of which shall be the remainder of the defendant's natural life and the minimum to be twenty-five years. Thank you, Your Honor.

THE COURT: All right, thank you, Mr. Lungen. Mr. Silverstein?

MR. SILVERSTEIN: If it please the Court, first as to Mr. Lungen's statement, I take exception that the killing was to eliminate a witness

since there is nothing whatsoever in this trial to support such a notion. As a matter of fact, nothing to support the conviction of intentional murder and very little to support a felony murder. I submit to the Court that Mr. Lucas is not the same man he sits here or stands here today ready to be sentenced as the man who was arrested six years ago. He has been in the prison system for six years already. You have three letters from people of importance in the correctional system indicating Mr. Lucas's rehabilitation already, that the fact that he assists others, the fact he is a member of the prison Lazon Committee, he has assisted the correctional department in matter involving prisoners, that should weigh for something. I understand what the Court said before - -

THE COURT: Mr. Silverstein, would you mind if I ask you a question?

MR. SILVERSTEIN: Yes, Your Honor.

THE COURT: Does Mr. Lucas, at this time, admit the commission of these crimes and express remorse for having committed them?

MR. SILVERSTEIN: Mr. Lucas expresses remorse

that such a killing should have taken place or that Mr. Mitton should be dead or Mrs. Mitton and the rest of the Mitton family should suffer. He continues to maintain his innocence and will always maintain his innocence because, in fact, he is innocent. I also submit to the Court that a comment made by it prior to allocution with respect to the fact that if there was capital punishment, then there would have been no rehabilitation. It appears that the State of New York, as expressed by the legislature, as well as the Courts of this State, disagree with Your Honor. And Your Honor is obligated to uphold the laws of the State of New York as set forth by the legislature by those courts. Since rehabilitation is considered even on the murder charge, the Court must take some cognisance of that rehabilitation. Its failure to do so, I think, is completely against the law. I submit to the Court that if rehabilitation is to mean anything and if it is to mean anything to people in prison, than this Court has to take some cognisant of it and consider that in its sentencing. I also submit to the Court that the Court itself, during the sentencing at the first trial stated, "I recognize that

Mr. Graham very well could have been making a self-seeking statement with regard to who did the killing and it's entirely possible that it was Mr. Graham that pulled the trigger rather than Mr. Lucas." I might say, Your Honor, that is not in direct quotes. I changed some of your words.

THE COURT: I still feel that way. That may very well be.

MR. SILVERSTEIN: I say to the Court that Mr. Lucas should get somewhat of a different sentence than Mr. Graham did. I submit to the Court that if Mr. Lucas were sentenced to fifteen years to life, which is a possibility that the Court can consider, that would not mean Mr. Lucas would be free at the end of fifteen years. It only means you would submit to the persons who best know, those people down the line at the time when rehabilitation is determined to have been made, they would be the ones to determine whether Mr. Lucas is released. They are the ones under the laws of this State of New York who are supposed to determine whether the man is to be returned to society. This court does, however, have certain rights to set the outer limits. I submit to the Court that it would be more fair

to the public and to Mr. Lucas if the Court set the lower standard as to the minimum so that the Parole Board at the proper time - - and we are talking about fifteen years down the road - - can make the determination as to whether or not Mr. Lucas should be released. Thank you.

THE COURT: Thank you, Mr. Silverstein.

Mr. Lucas, is there anything you wish to say in your own behalf?

THE DEFENDANT: Yes, Your Honor. Just a brief statement. In answer to your question as to whether I am remorseful about what happened, as Mr. Silverstein stated, I certainly am. If anything that I did, indirectly, can contribute to Mr. Mitton's death, again, I am remorseful for that. However, as Mr. Silverstein stated, I did not knowingly participate in the death of Mr. Mitton. I think that despite some of the arrests on my record, I think that my personal history also demonstrated I am capable of living the proper type of life in society. I was maintaining myself properly long enough to father six children out there and, during that period of time from 1962 until my arrests, I was always gainfully employed; and even though arrested, a

couple of times during that time they were for minor - - mostly domestic type of problems. As Mr. Silverstein stated, under the present system that we have, the legislature did create the laws that exist allowing for the possibility of rehabilitation. I believe that after a certain period of time that I can be rehabilitated and possibly contribute something to society and regain a respectful place in society. That's all.

THE COURT: Thank you, Mr. Lucas. It would seem to me that because of the overwhelming evidence in this case, that your denial of any direct knowing and intentional involvement in the death of Mr. Mitton amounts to a denial of criminal activity. And in order for there to be rehabilitation, it would seem to me the first thing we must have is penance and remorse. I don't think, in this case, that we really have that.

Secondly, with respect to the rights of the victim, let me say this. That I strongly believe that one of the most important and valuable rights of a decent human being is the right to life and the right to enjoy his life. And that, unless

society shows greater indignation at the taking of an innocent life that it does now, without a capital punishment law, that we, in effect, do not adequately respect the value of a human life. Now, I can't change that law. That's up to the legislature. I am merely expressing my view with respect to it. I think that the outstanding feature involved in the sentencing in this case is the severity of the crime and the regard I have for the life of the victim, Craig Mitton, his wife, who is still unmarried, and what it did to these people. And this is my main concern. Frankly, it is a greater concern to me than what it is that happens to you, Mr. Lucas.

Accordingly, it is the sentence of this Court - - and I might also add that I agree entirely with all the other statements made by the special prosecutor, Mr. Lungen, in his presentation. Accordingly, it is the sentence of this Court, under Count One, Intentional Murder, that you be placed in the care and custody of the Department of Correctional Services for an indeterminate period, the maximum of which shall be the remainder of your natural

life and the minum of which shall be twenty-five years. With respect to Count Two, Felony Murder, the Court imposes the same exact sentence. And, of course, since both the intentional murder and felony murder were committed during the course of one transaction, the law requires that the sentences be concurrent; and, accordingly, the Court orders that the sentence be concurrent.

Now, you have a right, as you know and your attorney knows very well, a right to appeal from your conviction and to appeal from the sentence. However, in order to do so you must file a Notice of Appeal within thirty days; and the Clerk will hand you a paper to sign showing you have been advised of that right to appeal.

Mr. Silverstein, you weregoing to submit a certain order to me; is that correct?

MR. SILVERSTEIN: That's correct, Your Honor.

THE COURT: All right. Is there anything further, gentlemen?

MR. SILVERSTEIN: The record may show, Your Honor, the Clerk of the Court has been give the Notice of Appeal and Mr. Lungen has been personally

served.

THE COURT: Very well. All right. As soon as the defendant signs the document he has, the defendant is remanded to the custody of the sheriff. The sheriff is further ordered to deliver the defendant to the Department of Correctional Services at the Ossining Correctional Facility, Ossining, New York, for the purpose of carrying out that sentence imposed.

(Whereupon, proceedings concluded at 10:05 A.M.)

Certified to be a true and accurate transcript of the proceedings taken herein.

ALBEE E. BOCKMAN
OFFICIAL COURT REPORTER

heim, we will have these items marked.

MR. OPPENHEIM: I would prefer to proceed with Voir Dire and I think it makes a difference.

THE COURT: Alright, go ahead.

VOIR DIRE BY MR. OPPENHEIM:

Q Sir, I show you People's Exhibit One for Identification which you have identified as rags and I ask you what is actually contained and make up that exhibit?

A Some sorted rags.

Q Merely rags?

A Judge --

Q Are they torn rags or something else? Do you know, sir, what the exhibit, other than what the tag says -- withdrawn. I ask you if you know what the exhibit consists of as opposed to what the tag says?

A To me, rags.

Q Would you open the bag and please examine the items contained therein?

MR. LUNGEN: Objection. This is improper on Voir Dire.

THE COURT: I understand all of that, Mr. Op-

penheim, I take it this is just a preliminary question and I will overrule the objection. Ready to answer the question?

THE WITNESS: Yes.

Q Can you describe them, please?

A We have three rags. What they were formerly -- what are you getting at?

Q Some of this -- two of them are perfectly intact. Rather dirty.

A I don't know what this is. A piece of cloth from something.

Q A seat cover or something?

A To me, it's a rag. I will not speculate as to what it was.

Q The other items?

A This is a T-shirt or was a T-shirt laying in the car. Dirty. I refer to it as a rag.

THE COURT: Third item?

THE WITNESS: The third item is the same.

THE COURT: Can it be put back?

MR. OPPENHEIM: Two white dirty T-shirts and a white cloth.

A Right.

Q I show you Exhibit Two for Identification and ask you to tell us what the separate envelopes contain therein and where they came from? T might be easier. They have a letter. You want to pick them out in order?

A Alright.

THE COURT: Mr. Oppenheim, according to my record, Exhibit Two, from what the testimony was, contains vacuum sweepings from the automobile, 51A thru I according to state police numbers. What is the purpose of going through each and every one?

MR. OPPENHEIM: My intention is to identify each part of each exhibit so my claim could be made later as to what the exhibit contained. To see an exhibit of sweepings containing nine items is interesting but doesn't limit us.

THE COURT: So what you are saying, to get your position clear on the record, you want these items identified with greater particularity so upon trial, if the suppression motion is denied and they are permitted to be offered as evidence on trial, that these very same items that were the subject of this hearing would -- you would then

know that they were the same items being offered on trial?

MR. OPPENHEIM: Yes, that's certainly part of it. It is important to identify this. We have it, might say, and some of these exhibits, there are over forty items. Now the fact that the People have assigned one number to them --

THE COURT: I think your question is to avoid any possible change of items between the suppression hearing and the trial and it is a legitimate question. But I am limiting it to that.

MR. OPPENHEIM: I can do it much quicker if I can read it into the record.. Do it that way.

THE COURT: Maybe the district attorney --

MR. OPPENHEIM: He can just stand here and the district attorney can look over my shoulder and I can read what each item consists of.

THE COURT: If the district attorney has no objection to that and it would save time, why not.

MR. LUNGEN: Because I am objecting to what Mr. Oppenheim wants to do as being completely improper as to whether or not the warrant on the car was valid or not. Mr. Oppenheim has already

had discovery and made his own notes and enumerated each item of the exhibit.

THE COURT: Mr. Lungen, we will know at the trial what specifically was the subject of the suppression motion and what was not. So this is for the purpose of identifying the different items with greater particularity.

MR. LUNGEN: However the Court wants it to be done. I don't care what procedure you want.

THE COURT: I can't compel either party to do anything. He has a right to do it piece by piece. Do you have any objection?

MR. LUNGEN: No, if the Court is ordering and says that he has a right, no objection.

THE COURT: Just read it into the record what the different items consists of in detail.

MR. OPPENHEIM: Item A is vacuum sweepings from the right front inside area of the Lincoln.

THE COURT: The record should indicate that Mr. Oppenheim is doing this in the expeditious manner from reading from the labels on the various items.

MR. OPPENHEIM: Item B are vacuum sweepings from the rear seat of the Lincoln and merely consists of two bags stapled together, both labled rear seat. C is vacuum sweepings from the left front area of the Lincoln. D is vacuum sweepings from the left rear area of the Lincoln. E is vacuum sweepings from the right front interior identified as car #900. I is ashtray contents from the Lincoln. H is vacuum sweepings from the trunk interior of the Lincoln and G is vacuum sweepings from the right rear interior area.

THE COURT: Are you through with that Exhibit? Why don't we put it all back together.

MR. LUNGEN: There is no F in that bag. It was removed and it is at the laboratory.

MR. LEOPOLD: Can we identify it.

MR. LUNGEN: It was done after discovery and inspection. Three weeks ago.

THE COURT: What did F consist of?

MR. LUNGEN: It's a hair from the trunk.

THE COURT: A hair?

MR. LUNGEN: Yes. If it is not in there,

that's the reason. It was removed after discovery and inspection.

THE COURT: Alright.

MR. OPPENHEIM: Exhibit SH3 consists of an envelope of the Empire National Bank stamp dated August 19, 1975 and an envelope of one Goldenning Place stamped date July 15, 1975, sealed. Mobile receipt for $10.30, January 28, 1975. Empire National Bank 24 hour teller receipt of July 1, 1975 the amount of $50, 1520297. A piece of small note paper addressed with Honey and signed Sheryl. A box rent receipt, United States Post Office, Walden, New York, June 19, 1975 to R. Lucas, #233. Bank Americard receipt for $5.25, June 25, 1975 to Richard Lucas. Empire National Bank receipt for the sum of $300 dated June 25, 1975, serial number 151461. A receipt, truck stop of Pennsylvania, amount of $7.06, June 6, 1975. A receipt of J.I. Russa & Son Jewelers, Walden, New York, dated March 26, 1975 in sum of $31.20; A note on the back of a piece of paper headed miscellaneous general voucher containing the

name Leland Sisson a letter of Highland Telephone dated August 6, 1975 addressed to Richard P. Lucas; a receipt of Rhulen Sisson to Richard Lucas dated May 29, 1975 showing a bank balance of $100; a receipt of Rhulen Sisson to Richard Lucas dated May 29, 1975 for $160 rent; a receipt of Leland Sisson to Richard Lucas dated August 7, 1975 for $160 for rent; a Bank Americard receipt for $10.30 dated June 26, 1975 for the of East Stroudsberg, Pennsylvania; Union 66 receipt of June 5, 1975, $7.85 to Richard Lucas; Empire National Bank 24 hour teller receipt dated July 17, 1975 the sum of $239.36, 153200 is the serial number; Empire National Bank 24 hour teller receipt dated July 9, 1975 for the sum of $250, number 152673; a wage deduction sheet of Cooper-Jarrett, Inc. for June period ending June 14, 1975 showing the net pay of $395.50, check number 276011; Empire National Bank 24 hour teller receipt of June 5, 1975, the sum of $190.77, 1150565; a Carrol's matchbook with writing figures on it; a small piece of note paper dated May 3,

addressed to whom it may concern, signed Carol A, Lucas; an Empire National Bank checking account miscellaneous debit of March 24, 1975 contains inward to close the account; an envelope with a window containing a notice from the general notice acceptance, layed claim due dated August 5, 1975; a Bank Americard receipt to Richard Lucas from Rob Rohl, Inc., in the sum of $6 dated June 21, 1975, Bank Americard receipt to Richard Lucas from the Truck Stops of America dated June 22, 1975 in the sum of $8.25; Empire National Bank 24 hour teller receipt of August 7, 1975, serial number 1543, $276.50; Empire National Bank 24 hour teller receipt Dated August 2, 1975, 154227 in the amount of $236.83; Empire National Bank 24 hour teller receipt dated July 21, 1975, 153511, in the amount of $50; Empire National Bank 24 hour teller receipt dated July 24, 1975, 153652 in the amount of $50; Empire National Bank 24 hour teller receipt dated July 26, 1975, 153762 in the amount of $25; Empire National Bank 24 hour teller receipt of July 26, 1975, 153761, $25;

Empire National Bank 24 hour teller receipt of August 7,1975, 154523, in the amount of $50; Empire National Bank 24 hour teller receipt of August 7, 1975, 154524 in the sum of $25; Empire National Bank 24 hour teller receipt of August 14, 1975, 155013 in the amount of $50; a check of Richard Lucas, 196 drawn on the Empire National Bank to Night Market, $10; check of Richard Lucas, 191, of August 7, 1975 to Leland Sisson $160; check of Richard Lucas, 189, Leland Sisson, $190; check of Richard Lucas number 195, August 12, 1975, Grand Union, $10; check of Richard Lucas, 197, August 13, 1975, Commissioner of Motor Vehicles, $10.25; check of Richard Lucas, #194, Night Market, August 7, 1975 for $10; check of Richard Lucas, #196 of August 13, 1975, Daniels & West, $17.53; check of Richard Lucas of August 5, 1975, #193 to the Grand Union, $10; check of Richard Lucas, #188 of July 21, 1975 to the Grand Union, $15; check of Richard Lucas, #190 of August 1, 1975 to the General Motors Acceptance Corp., #154 then I have a check of #185 July 22, 1975 to

Charlie's Market, $10; check of Richard Lucas, #187 of July 27, 1975 to Florence Lucas, $25; #186, Richard Graham of July 25, 1976, $24; a check of Richard Lucas #184 July 17, Prudential Insurance Company, $25.42; check of Richard Lucas #182 Metropolitan Life Insurance Co., $27.05 of July 17, 1975; check of Richard Lucas, #174, to the Prudential Insurance Co. for the sum of $25.42 of June 30, 1975; #1832 BAC, July 17, 1975, $50; statement of account of Richard Lucas for the period opening July 18, 1975 and dated August 15, 1975; an envelope of the Highland Telephone Co. addressed to Richard Lucas; wage statement of Cooper-Jarrett, Inc. for the period ending July 12, 1975, in the sum of $239.36 for check #281637; wage statement of Cooper-Jarrett ending for the period of July 26,1975 in the amount of $236.83, check #284269.

THE COURT: Just mention from whom and to whom.

MR. OPPENHEIM: Wage statement for check #278859 for the period ending June 28, 1975,

net pay $51.04; wage statement for check #2828-16 for the period ending July 19, 1975; wage statement for check #780108 for the period ending July 5, 1975; wage statement for check #27-3885 for the period ending May 31, 1975; Bank Americard receipt from the Truck Stops of Pennsylvania to Richard Lucas, dated June 22, 1975 for the sum of $8; wage statement for check #274421 for the period ending June 7, 1975 to Reichs Banknotes for 20,000 marks but I don't know what kind of marks; a personal money order receipt of the Empire National Bank of April 25, 1975, #145628 to the Orange County Probation Department; a wage statement for check #2727 -- period ending June 21, 1975;

That concludes the contents of Exhibit Number Three.

THE COURT: I notice there are a number of other exhibits of loaded papers and you intend to read every paper?

MR. OPPENHEIM: Every one of them, sir.

THE COURT: I would like to take a recess, you gentlemen can work with the stenographer and

Steve and describe the contents of the exhibits.

MR. LUNGEN: I renew my objection. It is improper at this hearing particularly in light of the fact there has been a complete discovery and inspection of every one of the items listed in the inventory by each of the attorneys already. This is nothing more than a waste of time.

THE COURT: I agree that it would appear to me to be also a waste of time except that the defendant has a right to have all of the items in each exhibit identified in the record so he can be certain that at the time of trial that we know which items were and which items were not considered at the suppression hearing. And most reluctantly, I must overrule the objection.

MR. LUNGEN: I spent hours and days on discovery and inspection with the court. We are doing this all over again. And they know which one is going to be offered again.

THE COURT: I understand that. Rather than having a lengthy time and having a hassle deeming the credibility, I think it's simpler in the long run to just let the gentlemen, you gentlemen your-

selves read this into the record without the need for my being here. I take it you all consent to that procedure, is that correct?

MR. OPPENHEIM: Yes, sir.

MR. LUNGEN: I am not consenting to the procedure, but I will consent to you being absent.

THE COURT: Thank you to that. And we will take a recess.

MR. LUNGEN: My witness is excused?

THE COURT: I don't think you need the witness for this. We are recessing right now and expect you to call me back in here and call the witness back today.

MR. LUNGEN: This will not be done today. No way. It took us, between Steve, Michael, and myself--

MR. OPPENHEIM: I think about an hour. About four very large bags.

THE COURT: The witness is excused. We are taking a recess, and the only ones working will be the attorneys and the stenographer.

(At this time, a recess was called by the Court.)

(At this time, the inventory was continued

by Mr. Oppenheim and the stenographer.)

MR. OPPENHEIM: Exhibit Four, a plastic flag, from Great Adventure, Sheryl; a drawing signed Bevins, dated October 11, 1975 with writing on the back, Virginia Bevins; a printed slip of Eastern Airlines bearing the writing flight number 157 having bi-centennial terms on it; a receipt #260941 Holiday Inn of Daytona Beach, Florida, covering the period of October 8, October 12, portion of an Eastern Airline ticket, stamped October 8, 1975, NYC Kennedy to Daytona Beach; a card with back writing including flight number 157; a piece of lined note paper with various writing including, "dad, wake me up before you go to work"; an American Express Card application, signed Richard B. Graham, Sr., October 8, 1975; Eastern Airlines envelope with a ticket -- package stub attached for flight 157 to Daytona Beach, that's flight 157Y; an envelope of the Holiday Inn west of Daytona Beach addressed to Mrs. Anthony Parisi with a letter inside dated October 8 addressed Gram and signed "love always, Richie."; portion of an Eastern Airlines special

service ticket #229623, stamp dated October 8, 1975; small piece of unlined note paper having on it various writings including Avis 253-8183; an envelop addressed to the Spivak Agency, Inc. having a handwritten notation on it of flight 106; Exhibit Five, state police #58, a crumpled package of Benson & Hedges cigarettes, a package of four cigarettes, wrapper from a piece of Wrigleys doublemint chewing gum; a matchbook, more cigarettes; a matchbook, Foodtown; a piece of paper from a sugar packet; a piece of foil; a tab from a soda can or beer can; a receipt from a register Great American, $2.52; another piece of foil; a piece of cardboard paper from the log book; a driver's daily log book of Richard F. Lucas, first entry July 2, 1975, mileage 408 miles; file entry July 31, 1975, off duty; another log book, first entry August 1, 1975 marked off duty, the last completed entry being August 14, 1975, 408 miles; Exhibit Six, #56, contains a wallet, piece of hair or matting, contains a card of Donald H. Hannah, Central Hudson Gas & Electric Corp., receipt November 7,

1973, deposit #435299; Grand Union receipt -- withdrawn. Receipt of payment to the Milk Drivers and Dairys Employees Union of November, it says 38, 1973 probably November 30; it's not clear, $401; a receipt of Milk Drivers and Dairy Employees Union, December 28, 1973, $24; social security account number of Richard B. Graham,II 113-42-8995; social security account number of Richard B. Graham, Jr, #113-42-8995; member of the International Brotherhood of Teamsters, initiated November 30, 1973; a cash register receipt with numbers and writing on it; a portion of a cash register receipt with the writing Richard Graham, WB621 on it; another such receipt, Richard B. Graham, weekend of June 14, no number; a receipt of April 22, 1975 for 5#; operators license of Richard B. Graham, 6009759, September 24, 1971; a piece of paper with the name Jimmy, it who is on at the period; a receipt of James Flannery, DVM 18422 of October 8, 1975 for $10; a card ofNycrest Corp. with writing on the back including the name of Bob Steel; a communion prayer card in plastic; a

card of N.F.I. personnel Agriculture of Newburgh, Inc. with the name Marcia on it; TWA "getaway car" to Richard B. Graham, II, 15215#2139700; a receipt of Tony's Parking and Lockers #2341; a membership card in plastic of Blackrock Fish and Game Club, 1017; a plastic card of the Wife Swappers Club International; a membership card of Blackrock Fish and Game Club, #186; a receipt of J.C. Penny Co, Inc., 678631 for the sum of $56; a color photograph in the bag says to Jeff with love always Birdie; another card of Nycrest Corp.,#5619351; a group information card of the Hartford Life Insurance Co., Hartford Life and Accident Insurance Co., Hartford Accident and Indemnity Co., policy holder being the Nycrest Corp; a slip of paper receipt of May 9, 1975 for $140 from Jay Jay McCort; a green office memo of July 19, 1975 being a thing of certain items sold to Edward J. Halford; slip of paper with the name Dana to Heesa Wolhrab and other writing; a claim check of Radio Shack, May 24, 1975, #154875; a receipt of Walden Auto Parts, Inc., #10257 of January 30, 1975, the name of walt Kendy on the back and other figures; a receipt of Gulf, #32549662, $25 marked paid in full; a repair

tag and invoice of Radio Shack, #063886, dated May 10, 1975; a club member card of Ice Cave Mountain, 1974 in the name of Iris Agroyan; card of Newburgh Part Motors, Inc. with the word Tex and numbers on the back; a penny arcade photo of a girl with writing on the back, "to Richie with all my love"; selective service registration of Richard Barcley Graham, Jr.; notice of classification of Richard B. Graham, Jr., July 9, 1969; receipt of something Weaverco, Inc. of June 17, 1975 in the sum of $25.80; customer signature card of Richard B. Graham, #634-BL7 and a resident fishing license #RF610309, for the period October 1, 1973 to September 30, 1974; black wallet, I think this is number nine, state police #54; this is a red leatherette Texaco red atlas cover containing a Texaco road atlas; envelope, P.O. Box #861, Middletown, New York, of August 25, 1975, containing Bank Americard statement to Richard Lucas for the billing period 8/21/75, also including a blue notice, Bank Americard is now past due; a purchase of Mobile Oil Corp. of July 28, 1975 for the sum of $10.30; and a pamphlet which starts, "most people like puzzles, but not when it comes to paying bills.";

envelope of P.O. Box #861 of September 25, 1975 containing a Bank Americard statement, billing period September 22, 1975, a blue slip saying, "your Bank Americard is now past due"; and a card dated October 17, 1975 showing a balance of $804.39; a purchase of Sunoco of $11.75 of August 31, 1975; a purchase card of Sunoco of August 30, 1975, $12; a purchase card of August 29, 1975, Exist 31 Motel, $31.03; a purchase card of Blue Ridge Motel of August 30, $29.96; a purchase card of the Mohawk Motor Lodge of August 27, 1975, $23.54; a Bank Americard flier headed "you may now request a cash advance from $50 up to your available credit line balance; mailing envelope flier; Bank Americard for the purchase of an all-weather jacket; an envelope of the Empire National Bank of Newburgh dated September 18, 1975 with a statement of Richard P. Lucas dated September 10, 1975 containing an Empire National Bank white and gray unfilled out check of Richard P. Lucas; 205, August 23, 1975 to a Neil Buckland, $12; check 277, September 4, to Beneficial Finance, $26.61; a check of Lucas, 202, August 20, 1975 to the Grand Union, $15; check of Lucas, 218, Sept-

ember 6, 1975, Village of Walden, $4; #214, August 28, 1975 for cash, $30; check of Richard Lucas, #193, 8/14/75, Charlie's Market; check #211 dated August 23, 1975, BAC, $50; #209, Leland Sisson's, in the amount of $190 of August 28, 1975; #207, August 26, 1975, Mike's Market, $10; #215, August 2 to the Holiday Inn, $2.26; check #216, September 2, 1975, cash, $30; #206, $8.25 to the Grand Union -- $25; #203, 8/21/75, to Charles Rakowski for the sum of $100; #204, Richard Lucas, Capitol Finance, $8.28; a check to Richard Forsyth in the sum of $180; check #208, August 27, 1975 to the Grand Union for the sum of $35; notice of insufficient funds and charges of the Empire National Bank, August 29, 1975, $15; notice of insufficient funds and charges, August 28, 1975 for a check of $10; notice of insufficient funds of August 26, 1975 for two checks, one of $15 one of $25; an insufficient fund non-collected funds, returned check credited of the Empire National Bank, August 26, 1975, for the sum of $15; insufficient funds and uncollected funds, and return check credit of August 28, 1975 for $10; Empire National Bank 24 hour teller receipt of August 25,

1975 marked paid August 25, 1975, dated August 23, 1975, 155576 for $25; Empire National Bank 24 hour teller receipt of August 21, 1975 #1155446 for $25; an envelope of the Highland National Bank of Newburgh, September 2, 1975 containing a Continental Insurance Co. certificate of insurance on loan or account 00-18-6-2109; a Highland National Bank of Newburgh payment book which only payment stub one is taken out. The rest are here on account number 318002109; New York Sate Insurance identification card issued to Richard P. Lucas, effective date September 12, 1975, expiration date, March 12, 1976; a plastic envelope containing a certificate of registration issued to Richard P. Lucas for a 1974 Lincoln, 9000-HQ; a retail installment contract signed by Richard P. Lucas, Daniels & West, Inc., dated August 12, 1975; a letter of Daniels & West, Inc., form letter with warranty, dated August 12, 1975; an envelope of New York State Department of Motor Vehicles dated August 21, 1973 containing a certificate card saying "contains certificate of title of a vehicle", New York State Identification card to Richard P. Lucas, period June 12, 1975 to March 12, 1976; New York State In-

surance identification to Richard P. Lucas for the period August 12, 1975 to March 12, 1976; a form, NV50.2, used vehicle certificate of the Department of Motor Vehicles; odometer certification, Daniels & West, Inc. for a 1973 Chevrolet that's a yellow one; another one, odometer mileage certificate of Daniels & West, Inc. for a Lincoln Continental; a sales statement of Daniels & West, Inc. to Richard P. Lucas covering the 1974 Lincoln dated August 12, 1975; all of those items being in clear plastic envelopes; an envelope of William L. Cleary, Metropolitan Life, 603, Port Jervis, New York addressed to Richard P. Lucas containing a lot of blank envelopes stamped to William L. Cleary, Metropolitan Life, Box 603, Port Jervis New York, the exact number of those envelopes, white envelopes, is ten; Western Union money order receipt, Mod, 905688, $100 to Carol Lucas; a box of the Empire National Bank addressed to Richard P. Lucas, inside the mailing box is another box, Spirit of America, inside that box is a flier for the Bicentennial American Revolution, Spirit of America checks; a green and white form bearing inspection #32695; a checkbook of Richard

P. Lucas of the Empire National Bank going from check 251 to and including check 275 with unused deposit slips at the back; another checkbook going from #276 to 300 with unused deposit slips on the back; and an envelope in green and white which has open lines for addresses, no addresses on it; an envelope with the printed stamp of Morristown, New Jersey, containing therein a receipt of the Beneficial Finance System of September 17, 1975 showing a payment and other credit of $54; a flier of the Beneficial Finance System, special announcement for cousins, parents, etc.; a gray envelope bearing no writing on the outside except first class mail, place postage -- necessary postage here containing two windows; a form, BC30NYLD, January '75 which starts out according to chapter 20, article 34 of the general business law of New York; an envelope from St. Lukes Hospital, Richard Lucas spelled L-U-K-U-S which has not been fully opened from which I can extract a balance due, bill of August 9, 1975, the sum of $69.25; a card of the Double R Electric Service, Inc. with writing on the back; a paper napkin; and a card of Brownell Motors, Inc.; card of

the Mohawk Motor Lodge; receipt of Sun Oil of August 30, 1975, ticket 7020021 in the sum of $12; A Bank Americard receipt of August 31, 1975, Mohawk Motor Lodge, $23.54; half a match cover of H.L. Harris & Co.; envelope with the words L & D written in hand outside and contained therein a summons with notice and action, Pearl Appliances, Inc. against Richard Lucas, to which is attached a schedule A, a bill of Pearl Appliances; an envelope from P.O. Box 563 addressed to Richard Lucas and containing therein a memo, Mgr., Finance Service, Inc., dated August 15, 1975; and a notice to Assignor dated August 15, 1975 signed by R.G. Cervo; a checkbook of Richard Lucas containing one check filled out #213 dated August 28, 1975, Valley National Bank, and containing some money; unused deposit books; notebook page, September 9, 1975, Dear Luke, signed C and Tom; a card, pink card tatooing; a receipt of the Chauffeurs warehousemen and Helpers of America for $12, August 15, 1975; another receipt of the Connecticut Turnpike for $50; customer receipt for United States money order, #19252126923, $25; the date is July 21, 1975; a piece of lined note paper, headed one-half cup cider,

vinegar; a payment receipt of the Financial Service, Inc. for $6.21 of August 21, 1975; an envelope, first class mail prestamped, Des Moine, Iowa containing therein a receipt statement from the Financial Service, Inc., to Richard Lucas, dated September 23, 1975 and shows amount due of $32.25 and also contains therein an envelope with windows -- three windows and inside shows pink and white candy stripes; a card of Rick Forte with writing on the back; Bank Americard receipt to Richard Lucas of 8/29, sum $39.03; a book of matches from Shopwell; a comb; a Jarrett wage statement for check #228965 of August 9, 1975; a receipt of the Chauffeurs Warehousemen and Helpers of America, May 14, 1975 for the sum of $12; another card of tattooing with the word Richard and the #652-0950 written on it; a drawing card of the Wallkill Fire Department #117, another drawing card of the Wallkill Fire Department #123 and a Mobile receipt of $10.50 from L. Mirtallo; a receipt of the Chauffeurs Warehousemen and Helpers of America for $12, July 25, 1975; a receipt for voluntary surrender of registration of plates issued 8/12/75 to Richard

Lucas; an envelope of the Motors Insurance Corp. dated July 18, 1973, Albany, New York containing a letter of Motors Insurance Corp. dated July 19, 1973 addressed to Richard P. Lucas; a from headed "agreement to provide physical damage insurance" dated July 19, 1973; New York State Insurance identification card to Richard P. Lucas effective date March 12, 1974 to March 12, 1975; business reply mail postcard to the New York State Department of Environmental Conservation regarding a deer report; a registration to Richard P. Lucas for a 1973 Chevrolet pickup expiring April 30, 1974; odometer mileage statement on a Chevrolet dated July 19, 1973 attached to a car invoice, #9813A of Barge Chevrolet, Inc. dated July 19, 1973; a letter from the Department of Motor Vehicles addressed to Richard P. Lucas dated May 7, 1973; certificate of life insurance protection issued to Richard P, Lucas of the Credit Life Insurance Co., #A9576 effective July 19, 1973 and attached to that a certificate of accident and health insurance of the Credit Life Insurance Co. of July 19, 1973 bearing the #A9576 also; a pamphlet for the official New York State Bicentennial Medal;

retail installment contract between Lucas and Barge Chevrolet, Inc. of July 19, 1973; an envelope pamphlet of the New York State Department of Motor Vehicles with the heading "suppose your license were taken away"; a brochure, 1973 Chevrolet, light duty truck emission control systems; a warranty, 1973 Chevrolet truck, dated July 19, 1973; also contained in that envelope I am presently describing is another envelope of the Motors Insurance Corp. of August 1, 1973 in which there is a notice headed "important, your C.I.M. policy is enclosed"; a Motors Co. physical damage policy, family automobile form; an envelope addressed to the Motors Insurance Corp.; identification card, back headed "what to do in case of accident"; a Motors Insurance Corp. amendment, termination provision for New York; a statement for the policy covering period July 19, 1973 to July 19, 1974; an address book with invitations, wood grain cover, actually, it's not stamped on the front cover, A to Z, index notebook, it contains addresses; a card of the Crawford & Co., writing on the back including grandma; a corner of an envelope with the number 561-6177; a room assignment card

of the Exist 31 Motel of August 2y; a card of the Walden Insuring Agency with writing on the back, 564-1660; 24 hour teller receipt of the Empire National Bank of August 14, 1975, #155012 in the amount of $244.85; a piece of paper headed with the name Wayne on it; 24 hour teller receipt of the Empire National Bank of August 21, 1975, #155445 in the amount of $188.61; a card of Daryl Porn, Mgr., Texaco, writing on the back headed "Evelyn"; a deposit receipt of the Empire National Bank of August 3, 1975, no, that is September 4, 1975 in the sum of $200; a Bank Americard receipt of August 30, 1975 in the sum of $29.96, Blue Ridge Motel; Sun Oil Co., receipt, August 31, 1975 sum of $11.75; a sheet of note paper headed "Joe Short."; an envelope, part of the envelope dated July 18, or June 18, 1975. It's not clear, it is addressed to Cheryl Crone with writing on the inside of the envelope; a card of Burtling Realty, Inc. with writing on it. Writing on the back headed, "Mom"; a stub, Valley National Bank, Walden, New York of July 8, 1975 in the amount of $49.70; a receipt of Marie Boat, $4.00, September 6, 1975,

#3305; a Mobile travel map of Colorado and Wyoming; a Texaco map of New York; a Sunoco map of New York; a Texaco map of Delaware, Maryland, Virginia, and west Virginia; a Texaco map of Maine, New Hampshire, and Vermont, and an unused self-postal envelope with a U.S. postage, Boston, 10¢; an envelope of the Travelers dated September 18, 1975 including therein a card addressed, "Dear Policyholder."; a card in a red and white envelope with a Sears and Roebuck Co. dated August 18, 1975 containing therein a statement of August 15, 1975 total due of $15.75; also containing a Sears advertisement for Charlie's perfume; business reply mail card to Allstate Insurance Co. and the business reply envelope to Sears, Roebuck & Co.; an envelope of P.O. Box #999, West Port, Connecticut stamped August 21, 1975 containing therein to the Danbury Mint, Medallic History of America, two coins in a card; a envelope addressed to the Danbury Mint and billing statement for $31 dated August 22, 1975; an unopened Bic Click Blue refill; a black ite Brothers medium point pen with cover; a shocking pink Bic Click pen; a piece of rubber tubing about two inches long; a red and clear plastic

Bic pen; a 5¢ piece, Buffalo, and another paper napkin;

It's yours, Michael.

MR. ZAGER: Number Ten, state police #59.

White envelope, State of New York Department of Motor Vehicles dated September 9, 1975. Inside the envelope is a certificate of title of Richard P. Lucas, #C1868132 with a letter entitled, "enclosed is the certificate of title of your vehicle."; a white envelope addressed to Casualty and Insurity, Davis and Life Casualty, Richard P. Lucas; white piece of paper with a yellow caution sign, caution sign which says, "your annual key fee is past due from Playboy Club."; a bill from the Playboy Club to Richard P. Lucas in the amount of $183.01, dated September 28, 1975; a letter addressed to the Play-Boy Club International, Inc., on the face of the letter indicates "don't move an inch" with a picture of an optical tape measure; a document from the U.S. Department of Agriculture, Farmers Home Administration with an option to purchase real property, with a description of the property which should be conveyed to Barbara S. Paust, containing

a description of the property, total price of $19,000 envelope dated October 6, 1975 containing a statement from the Playboy Club, inside it has an advertisement for 15 day free trial for a tire inflator; a base mail reply from the Playboy Preferred, Inc.; an advertisement for a suede cowhide jacket; a piece of white scrap paper with the number 77813977 with the name Ronnie on the back and several numbers and figuring on the side; a white envelope from Etna Life & Casualty dated September 29, 1975, containing a letter to Richard P. Lucas from the Etna Life & Casualty; report on an accident dated 9/1975; an envelope from Sharon Yankow; an envelope from the Travelers, Hartford, Conn., dated September 10, 1975 containing policy identification number, Travelers Insurance Co. number, 0089C6004101l; also containing a black-blue envelope; white and green bordered first class mail envelope with no address containing a receipt from the Beneficial Finance Co.; also containing a special announcement to cousins, uncles, grandparents, friends, containing two of those I just read; yellow paper reciting the law according to chapter 20, article 24 of the

General business law of New York; also containing a gray blank envelope dated -- Hartford, September 9, '75 from the Travelers Insurance Co. containing New York State identification card for one Richard P. Lucas; also containing a copy of the New York State Insurance identification card for Richard P. Lucas and a letter entitled "Dear Policyholder, here are your new insurance identification cards."; an agreement between Leland Sisson with Richard P. Lucas dated July 26, 1971, Gerald N. Jokobowitz, Counselor at Law, Walden; envelope dated September 11, 1975 from the General Motors Acceptance Corp. containing a thank you for your last payment to Richard P. Lucas also containing a retail installment contract, by your name Richard P. Lucas, describing a new 1973 8 cylinder Chevy crew cab for a 1972 Dodge sports van; letter dated September 11, 1975 to Richard P. Lucas from Charles Roskoski with a letter from Charles Roskoski to Richard P. Lucas dated September 10, 1975; white piece of paper via Cooper-Jarrett with half of 9/20/75 Gross 14029.23, WH 2,174.60; ST 701.40 via, $824.85 $828.68 was the F.I.C.A.; number 11, state police #62; one driver's

daily log book starting with 9/1/75 going to the date 10/1/75; one leather buckle type log book cover containing a travel map, North East, including New York, New England area; travel aid interstate map and directory cover; Sunoco New York map; an envelope of the C.J. Shuttle Service containing a color picture of a man; two pages of a poem headed "These men with broken hearts"; four Cooper-Jarrett road driver's daily round trip pay sheets, one for October 10 and one for October 9, and one for October 8 and one for October 4; sixteen Massachusetts Turnpike Authority charge trip authorizations; six New York State Thruway charge trip authorizations; and a photostatic article headed "To our leway"; and a pocket of a leather case is a blue piece of paper postage will be paid and a 50¢ piece, and a Franklin piece; also in the container is a shocking pink and red ballpoint red pen; and a log book of October 2, 1975, to October 10, 1975, Cooper-Jarrett; piece of green paper foil and miscellaneous pieces of paper foil wrappers and foil; an old raisen and a piece of stone; Holiday Inn matchbook, a matchbook folded up in a Kool pack; copy of Deliverance by

James Dicky; an unidentifiable piece of something, paper, a letter of the State of Connecticut, Surrogate Court, third circuit of July 3, 1974; letter of the New York State Executive Department of Youth of October 6, 1975 to Carl Lucas, a Ford passenger invoice for serial #832128; an envelope from the New York State Executive Department of Youth, October 6, 1975 addressed to Mr. Carl Lucas; a blank form headed "Your child is allowed to make one call."; a pamphlet of the Division of Youth, Goshen Center, medical card, "I hereby give my permission, etc" that"s it. Number 19, state police #57: a clipping from newspaper, Monticello entries on the back, a picture of Jim Migli;seven wage payment envelopes of the First National Bank of Highland; a toothpick in a paper container; seventeen deposit slips on the First National Bank of Highland, New Paltz, New York; a memorial for a friend and relatives for Lloyd D. Graham, Sr.; a form of the wright Employment Agency with the name Mark Green written on it; a paper napkin with red lines and zags written all over it; and some handwriting on it; envelope of the Orange County Department of Social

services addressed to Richard Graham, September 30, 1975, containing therein a brochure of public assistance programs and a letter of September 3, 1975, postal form, U.S.C.I.A. 1[illegible], a small piece of note paper writing on one side headed "Lucas's Corners"; a piece of note paper with writing on one side headed "At Home", a tape from an adding machine; 7527:7A, tape $20.99 on one side and Western Telephone Co.; a picture image showing Santa Claus, a woman and a child; six postcards of the Holiday Inn, Daytona Beach, Florida; a [illegible] wallet containing a picture of a young man holding, written on the back to Iris, in the beginning; a picture of the Defendant, Graham from a penny arcade machine, written on the back, Husband and Richard, first year; a social security card number for Iris J. Graham and employment identification card of the Public Employment Service for Iris Graham, only date on it February 3, 1973; a student identification card, Newburgh Free Academy to Iris Clavis encased in plastic; a picture of a man and a dog; identification card of Iris Graham, 63 Liberty Avenue, Newburgh; the passenger registration

to Iris A. Graham, expiring December 31, 1972; a picture of a little girl, passport size, another picture of another girl, teen, black and white picture, a picture of a young lady and what appears to be a monkey. Written on the back, Iris and Cec Cec, 1968; two postage size pictures -- four postage size pictures of young children in color; a picture of Christ in a plastic container; a billfold, another picture of Christ; a picture of brother at graduation; picture of a baby and a young girl Mary Malinski; picture of a young lady to Iris, words cannot describe; picture of a young man headed on the back partially cut up to Iris, "best of luck"; picture of Defendant Graham taken in a penny arcade machine. That's it. A Xerox list of numbers headed Lake Street, extra, [illegible] and with some handwritten items on it; a receipt of Scott's Corners Service, September 25, 1975, $550; another deposit slip of the First National Bank of Highland, New Paltz, New York, blank; a receipt of the Holiday Inn of Daytona Beach, [illegible] and a blue and white Bic pen; Mid-Valley Oil Co. written on the First National Bank of Highland receipt; Number 13, state police #63;

book, Ferdinand by Monroe Munro Leaf; a Storytown coloring book; copy of Cut magazine for November, 1975; a copy of Playboy magazine for November, 1975; a Clinique receipt from Ann Taylor and Betty of Woodbury File; a blue book and a student's school paper, [illegible] entitled "I am the world the best of all" on the number 10, state police #63; one item of a mirror and a fingerprint tape. Number 15, state police #63; contains a film cartridge with scrapings of dry oil from the front cotton of the Lincoln and a film cartridge also loose items which are scrapings of dirt from under the Lincoln; Number 16, state police #63; this has matchbooks, one thousand recognition address labels; Winston, all name of matchbooks; Buffalo, Veretti House, Gerrys Corner Inn; another Pharmacy; Costa beverage, another Costa beverage, four Bic pens, name of matchbook cover, Freeman, the Finest Food Markets; another Pharmacy, another Costa beverage, Market Food and Vending Services; another personalized note station-ary; Corner Cola and Drive-In Co.; a Mickey Mouse watch; eighteen restaurant paper plates, empty; a Times Herald-Record of [illegible], 1975; a bar heading

Stationery, Holiday Inn, containing two envelopes blank and three pieces of blank Holiday Inn stationery; two personalized math pads and one in paper and one in cardboard; another one containing Holiday Inn stationery; a box also saying Holiday Inn stationery with two envelopes, three pieces of paper; a Tappart Driving School matchbooks and a Winston Cigarette matchbook; Number 17, #41: contains only one item which is this rope; Number 18, which is #53: contains only one item, a Holiday Inn matchbook. Number 19, #52: contains one item, a green extended shell. Number 20, #45: one item, a Ford key. Number 21, which has no other identifying numbers, is two items. License plates each by 999 OHC: Number 22, is one item, the gun. Number 23, #50: contains 8 yellow cartridges, 1 green one, 2 unused bullets, and what appears to be one spent bullet or a piece of metal of some kind. Number 24 are the warrants. Number 25, state police #42: is a single item, a blue American Express Travelers Check receipts to Richard P. Lucas for $2,020 grand total. Number 26, #43: one item, a blue American Express Travelers Check receipt to Richard B.

Graham grand total $1,919. Number 27, #44: two items, safe deposit box and a lock tester, split inside. Safety deposit box key. Number 28, #47: a box and lock. Plaid. Number 29, state police #46: consists of two photostatic sheets stapled together, front and back, front page contract individual, October 14, 1975, box 1047. The back is headed, in printing, appointment of deputy and is not filled out in any way. Number 30, #48: box rental rules and regulations for box 203 to Richard P. Lucas dated October 14, 1975. Exhibit 30 consists of the rules and regulations and the contract on the front. On the back, it contains only the following, stamped. October 14, 1975, October 21, 1975.

(At this time, the Court returns to the bench at 3:50 p.m. and testimony resumes.)

THE COURT: Gentlemen, I understand, you have placed all of the different items contained in the various exhibits in the record, is that right?

MR. OPPENHEIM: Yes, sir.

THE COURT: And you completed that jour .

MR. OPPENHEIM: Yes, sir.

APPENDIX L

TABLE OF CONTENTS

	PAGE #
Statement Pursuant to CPLR 5531.....	1
Statement of questions involved on Appeal, relating to this appeal.....	ii
Statement of the Nature of the Case.....	iii
Point I:	
THE COURT'S CHARGE CONSTITUTED REVERSIBLE ERROR IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS UNDER THE 5th AND 14th AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 6 OF THE NEW YORK CONSTITUTION.	
A. The court failed to set aside or the ruling of this court on the appeal from the first trial wherein this Court found that the charge of Kidnapping did refused in the charge to Keller and that the Guilty of Conspiracy had merged in the one to Murder Count.....	2
B. Charge on reasonable doubt was not fairly given.....	4
C. The Court failed to properly charge the jury as to the intent that they must find in order to find Lucas guilty of Intentional Murder.....	5
D. The Court's failure to charge as requested as to the shared intent of the co-defendant was multiplied by his failure to charge, as requested, Section 20.10 of the Penal Law.....	6
E. The Court failed to charge immediate flight.....	7
F. The Court's refusal to charge as to other requests deprived the defendant of a fair trial and due process under the 5th and 14th Amendments to the U.S. Constitution as well as Article I Section 6 of the New York State Constitution.....	7
G. The jury asked for clarification of the law on circumstantial error. The Court never replied.....	10

	PAGE #
Point II:	
DEFENDANT WAS TRIED UPON REMAND AND CONVICTED UPON AN IMPROPER, PREJUDICIAL INDICTMENT IN VIOLATION OF THE 5th, 6th and 14th AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 6 AND 12. DEFENDANT WAS ENTITLED TO BE TRIED ON A NEW INDICTMENT.....	11
Point III:	
THE PROSECUTOR'S SUMMATION WAS EXCESSIVELY PREJUDICIAL AND WENT MUCH BEYOND THE FULL MEASURE OF FAIRNESS DEFENDANT RESERVES, AND FURTHER, WITH THE COURT'S RULING AND THE MANNER IN WHICH DEFENDANT WAS JUSTIFIED IN THE STAND DEPRIVED DEFENDANT OF A DUE PROCESS FAIR TRIAL IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 6 OF THE NEW YORK CONSTITUTION.....	12
A. The Judge committed reversible error during summation by his ruling and colloquy which was totally improper and which dampened defendant's ability to object.....	14
B. The Court further impairs defendant's ability to object to summation.....	17
C. The prosecutor then improperly demeans the defense and the defendant.....	19
D. The prosecutor's over the prior continually alluded to circumstantial evidence as being direct evidence.....	24
E. Summation involving the widow was improper.....	25
F. The District Attorney erroneously commented on matters not in evidence.....	26
G. The prosecutor, over objection, improperly argued that defendant having one-half of the proceeds, made him equally guilty of Murder.....	27
H. Prosecutor's old-fashioned fire and brimstone closing was improper and the court committed error in overruling objections to it.....	29

PAGE NO.

I. The prosecutor improperly argued the non-appearance of a witness..... 28

J. [illegible] improperly suggested to indicate whether various prosecution witnesses were lying..... 31

Point IV:

THE SENTENCING PROCEDURE WAS IMPROPER..... 32

Point V:

THE DEFENDANT WAS NOT PROVED GUILTY OF EITHER INTENTIONAL MURDER OR FELONY MURDER BEYOND A REASONABLE DOUBT IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 6 OF THE NEW YORK CONSTITUTION..... 33

A. The prosecution's whole theory of intent rested ultimately on the prosecution's ability to show that Lucas had or shared the intent to murder the victim, and thus violated defendant's rights to due process under the 5th and 14th Amendments to the U.S. Constitution and Article I Section 6 of the N.Y. Constitution..... 33

B. By the same reasoning, it cannot be shown beyond a reasonable doubt that Lucas intended robbery or shared Graham's intent to commit robbery and therefore there is lacking the intent to commit felony murder..... 37

C. Lucas was not proved guilty of intentional murder or felony murder because insufficient facts exist to prove guilty beyond a reasonable doubt..... 37

D. This court has reversed convictions in cases with stronger fact patterns..... 39

Point VI:

TRIAL COURT RULINGS PRIOR AND DURING TRIAL WERE SO ERRONEOUS AS TO DENY DEFENDANT A FAIR TRIAL IN VIOLATION OF DEFENDANT'S RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 6 OF THE NEW YORK CONSTITUTION..... 41

PAGE NO.

A. The Court committed reversible error during the trial, allowing in evidence matters which were excessively prejudicial to defendant..... 41

B. Court committed reversible error in its rulings on defendant's Omnibus Motion..... 56

Point VII.

ILLEGAL SEARCH AND SEIZURE DEPRIVED DEFENDANT OF HIS/4TH AMENDMENT CONSTITUTIONAL RIGHTS..... 61

A. The police illegally made a second search of the Lucas car without a valid warrant and the fruits thereof should be suppressed..... 62

B. The search warrant did not allow seizure of the Lucas car and the application for the warrant likewise does not allow seizure of the car as opposed to the contents..... 64

C. The search of the car was illegal and the fruits thereof should be suppressed..... 67

D. All the items found in the overbroad search of the motel rooms should have been suppressed and evidence relating to the money should have been suppressed..... 68

Point VIII:

THE PROSECUTOR COMMITTED OTHER ACTS OF IMPROPRIETY WHICH REQUIRE REVERSAL UNDER THE FAIR TRIAL PROVISIONS OF DUE PROCESS UNDER THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I SECTION 6 OF THE NEW YORK CONSTITUTION..... 70

A. During the trial, the prosecutor improperly addressed the jury and attempted to curry favor, by showing that he was a volunteer fireman..... 70

B. During selection of a jury, the prosecutor improperly parked his car in the juror's parking lot with a large campaign sign thereon..... 71

PAGE NO.

C. The prosecutor was a member of the board of directors of the Legal Aid Society of Sullivan County, the attorney for defendant Lucas and therefor the appearance of impropriety existed..... 71

D. A Motion to recuse was improperly denied when it was apparent that the prosecutor would have to testify against defendant in another forum..... 72

Point IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS RULING ON THE SANDOVAL APPLICATION..... 74

CONCLUSION..... 76

Abbreviations

T	Transcript
T - 1	Page 1 of Transcript
T-A1	Page A1 of Transcript
A	Appendix
R	Record on Appeal
SH	Suppression Hearing
S	Sentencing Minutes
SAN	Sandoval Hearing Transcript

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

85-5116

Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

October Term, 1985

No. A-926

ORIGINAL

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

STEPHEN P. LUNGEN
Sullivan County District Attorney
Attorney for Respondents
Office and P. O. Address
County Courthouse
Monticello, New York 12701
(914) 794-3044

TABLE OF CONTENTS

Cases Cited		i
Opinions Below		ii
Jurisdiction		iv
Questions Presented		v
Facts		vi
Reasons Why the Writ of Certiorari Should be Denied:		
Point I	The Trial Court Properly Admitted on Rebuttal Testimony the Evidence Relating to the Admissions Made by the Petitioner.	1
Point II	The Seizure of the Petitioner's Automobile and the Subsequent Search and Additional Re-examination for Fingerprint Evidence was Constitutionally Permissible.	7
	(A) The Entire Lincoln Continental was Seized Pursuant to the Search Warrant	
	(B) The Seizure of the Automobile Permitted Subsequent Police Examination for Further Evidence	
Point III	The Petitioner's Argument that There was Double Jeopardy in a Re-trial on the Crime of Felony Murder Is Without Merit and Should Not be Reviewed by this Court.	14
Point IV	The Other Remaining Contentions by the Petitioner Do Not Raise Any Legal or Factual Bases Which Should Cause This Court to Entertain its Certiorari Jurisdiction and Review the Convictions of Petitioner for Intentional Murder and Felony Murder	15
Conclusion		16

CASES CITED

Graham v. New York 446 U.S. 590	iii
Miranda v. Arizona 384 U.S. 436	4
Payton v. New York 445 U.S. 573	iii
People v. Berzups 49 N.Y. 2d 417	14
People v. Cunningham 49 N.Y. 2d 203	2
People v. Graham 69 A.D. 2d 544	7
People v. Lucas 53 N.Y. 678	iii
People v. Lucas 73 A.D. 2d 699	iii
People v. Lucas 105 A.D. 2d 545	iii
People v. Ricco 56 N.Y. 2d 230	3
People v. Washington 51 N.Y. 2d 214	3,4
Portash v. New Jersey 440 U.S. 450	3
United States v. Brown 699 F. 2d 585	5
United States v. Johnson 457 U.S. 537	iv
United States v. Ross 456 U.S. 798	v, 13

In The

Supreme Court of the United States

October Term, 1985

No. A-926

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

OPINIONS BELOW

A judgment of conviction was rendered against this petitioner after jury trial of all counts in the Indictment on July 14, 1978. An appeal was taken to the New York State Appellate Division, Third Judicial Department, and an order was entered on July 20, 1979 modifying on the law and the facts the judgment of the County Court of Sullivan County by reversing the conviction for Kidnapping in the First Degree and Robbery in the

First Degree and dismissing those counts and as modified, affirmed the judgment convicting the petitioner of two counts of Murder in the Second Degree (see People v. Lucas, 73 A.D. 2d 699). On appeal, the New York State Court of Appeals on March 26, 1981 reversed the judgment of conviction and ordered a new trial upon the grounds that the admission made by the petitioner should have been suppressed under the New York right-to-counsel rule (see People v. Lucas, 53 N.Y. 2d 678). Upon the second trial the petitioner was again convicted of the remaining two murder counts with a judgment rendered thereon on October 28, 1981. On appeal to the New York State Appellate Division, Third Judicial Department, the judgment of conviction after the second trial was affirmed (see People v. Lucas, 105 A.D. 2d 545). An application for permission to appeal to the New York State Court of Appeals was denied by Chief Judge Sol Wachtler by order dated and entered on April 23, 1985.

The opinion of the Supreme Court denying the suppression motions of the petitioner and the co-defendant, RICHARD GRAHAM, is reported at 90 Misc. 2d 1019.

The companion case of RICHARD B. GRAHAM was before this Court on three separate occasions pursuant to writs of certiorari. On the first occasion the United States Supreme Court remanded Graham to the New York State Appellate Division, Third Judicial Department, for further consideration in light of its then-recent holding in Payton v. New York, 445 U.S. 573 (this was in the October Term of 1979, Docket No. 79-6182 with Order dated May 12, 1980). (See Graham v. New York, 446 U.S. 932 [1980].) On remand, the New York State Appellate Division re-affirmed the petitioner Graham's conviction with a decision reported at 76 A.D. 2d 228. On June 28, 1982 petitioner Graham's second

writ of certiorari was decided by this Court and again vacated the judgment of conviction and remanded the same to the New York State Appellate Division for further consideration under the holding in United States v. Johnson, 457 U.S. 537 . On this second remand the Appellate Division re-affirmed the Graham murder conviction with an opinion at 90 A.D. 2d 198 (1982).

The petitioner Graham filed a third writ of certiorari to this Court under Docket No. 83-5147; and by order entered October 11, 1983, the petition for writ of certiorari was denied.

JURISDICTION

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

(1) Did the Trial Court properly admit on rebuttal testimony the evidence relating to the admissions made by the Petitioner?

(2) Did the seizure of the Petitioner's automobile pursuant to warrant and the subsequent reexamination of the trunk for fingerprints constitute an impermissible second search?

(3) Was the seizure of the Petitioner's automobile and the subsequent reexamination legally permissible under United States vs. Ross, 456 U.S. 798?

(4) Was the Petitioner properly retried on the remaining counts of the Indictment without consituting any double jeopardy claim?

FACTS

The petitioner, along with his co-defendant RICHARD GRAHAM was indicted by the Sullivan County Grand Jury by Indictment No. 67-75 dated December 2, 1975 for two counts of Murder in the Second Degree in violation of §125.25 (1) and (3), one count of Kidnapping in the First Degree in violation of §132.25 (3) and two counts of Robbery in the First Degree in violation of 160.50 (1) and (2) all of the Penal Law of the State of New York.

Prior to trial the defendants moved to suppress the physical evidence seized pursuant to the three search warrants and the search incident to the arrest at the motel rooms in Florida, the confession of the defendant Graham and certain inculpatory statements made by the defendant Lucas. Although the trials had previously been severed pursuant to Court Order, the defendants had agreed that the suppression hearing be held jointly. All parties were given the opportunity to conduct a thorough cross-examination of all witnesses who testified. At the suppression hearing approximately ten full days of testimony was taken over a period of four weeks. Memoranda of Law were submitted. The Honorable Louis B. Scheinman, in a written opinion dated June 16, 1977, denied the defendants' motion to suppress in all respects (see 90 Misc. 2d 1019 [1977]).

The Court of Appeals, at 53 N.Y. 2d 678, determined that the property obtained from the motel rooms and the inculpatory statement of Lucas should have been suppressed. That decision was carried out by the Trial Court prior to the commencement of the second trial.

The second trial against the defendant/appellant, RICHARD LUCAS, commenced on September 21, 1981 before the Hon. Louis B. Scheinman, and the People presented witnesses reconstructing the crime scene, the flight through New Jersey to Florida, the arrest, the recovery of the cash proceeds of the murder and the fingerprints of the victim in the defendant Lucas' automobile.

On October 7, 1981, the jury returned a verdict of guilty for the crimes charged; namely, intentional murder and felony murder. On October 28, 1981 the Court sentenced Lucas to two concurrent twenty-five-year-to-life sentences.

On October 15, 1975, Craig Mitton's body was found on an abandoned piece of property off a dead-end dirt road which was formerly known as the Brookhaven Bungalow Colony, located off Roosa Gap Road, Bloomingburg, New York. Upon investigation, it was determined that Craig Mitton was shot three times by .25 caliber weapon: two bullet wounds to his head and one in his back.

On October 13, 1975 Craig Mitton reported to work as a salesman/courier for courier for Mid-Valley Petroleum Corporation of Newburgh, New York. He had commenced work there effective October 2, 1975 replacing one Richard Graham who was fired on the same date for failing to make a $30,000.00 cash deposit on September 29, 1975. Part of Craig Mitton's duties required the daily collection of cash receipts from the various company-owned gas stations of Mid-Valley Petroleum Corporation. He would then place the cash in locking deposit bags and make a deposit at the First National Bank of Highland, located at the intersection of Route 9W and Chestnut Lane, Newburgh, New York, using the night

depository vault located on the outside of the bank. These were the identical duties that the do-defendant RICHARD GRAHAM had before his firing.

On October 13, 1975, Craig Mitton came to work at the request of Mr. John Alsfeld. Because this was Columbus Day, this normally would have been a day off for the courier and Mr. Alsfeld would have made the daily collection.

On October 13, 1975 Craig Mitton made his daily collections of the various gas stations and prepared his receipts for deposit on four locking bank bags numbered "451", "743" "590" and "206". At approximately 4:30 p.m., using a company-owned vehicle, he left the main office in Newburgh for the First National Bank of Highland to make the deposit of $25,647.10 in the night depository as was the usual procedure.

Since this was Columbus Day, the bank was closed. Further, after examining the bank's records, it was determined and known by October 14, 1975 that the deposit was never made. Additionally, it should be noted at this point that on October 29, 1975 the four locking bags and black briefcase assigned to Craig Mitton were recovered in a wooded area on Stone Castle Road in Newburgh, New York. Richard Lucas was employed by Cooper Jarrett, Inc. as a truck driver in October, 1975, and their truck terminal is located on Stone Castle Road.

On the evening of October 13, 1975 Craig Mitton was reported missing by his wife and also an officer of Mid-Valley Petroleum Corporation. His whereabouts remained unknown until his bullet-ridden body was fortuitously discovered on October 15, 1975 at approximately 1:00 p.m. by two women in the woods picking myrtle.

Thereafter, the New York State Police began an intensive homicide investigation which over the next two days revealed: Richard Graham's relationship to Mid-Valley, a positive identification of Richard Lucas and his Lincoln Continental with another passenger being seen at the First National Bank of Highland at the same time that Craig Mitton was to arrive to make his night deposit, Lucas' violent criminal background, including his very recent need of money and his threat of violence to Gloria Baker, an employee of Mid-Valley Petroleum Corporation; Graham and Lucas; friendship and that they both, along with two female companions, hastily left the Newburgh-Walden area on the early evening of October 13, 1975.

On October 15, 1975 the police located the company-owned vehicle that was assigned to Craig Mitton off a dead-end road in a heavily-wooded area, quite a distance away from where his body was found. Inside the vehicle were the clothes he was wearing on October 13, 1975 when he was last seen alive and his change box which was empty.

The police investigation continued, and in the early morning hours of October 17, 1975, after searching the New York airports and their surrounding areas, found the Lincoln Continental owned by Richard Lucas (being the same vehicle identified at the bank) secreted away in an underground garage at the Downtowner Motel in Newark, New Jersey. Later that day, members of the New York State Police appeared before Superior Court Judge Nicholas Scalera and obtained a search warrant for the Lincoln Continental of of Richard Lucas, whereupon they seized the automobile and its contents which included a shotgun with cartridges, a length of rope and identification of Graham and Lucas.

On October 16, 1975 the police learned that one Georgia Shorey had received a moneygram from Lucas and that it was sent from Fort Lauderdale, Florida. She further related that she was instructed by Lucas not to tell anyone where they were. On October 17, 1975 in the evening, the New York State Police flew to Fort Lauderdale, Florida, and after making contact with the Broward County Sheriff's Department on October 18, 1975, they checked the Western Union Office in Dania, Florida and obtained the address of the defendants. The defendants had registered in the Airport Travel Lodge Motel with the two girls and a Doberman pinscher dog.

On the evening of October 18, 1975 the New York State Police and the Broward County Sheriff's Department kept Rooms 307 and 308 of the motel under surveillance. The defendants were not in their rooms and they did not return to the motel until approximately 6:00 a.m. of October 19, 1975. During the evening hours of October 18, 1975, the New York State Police contacted their headquarters in Middletown, New York, requesting that they obtain arrest warrants and to teletype the Broward County Sheriff's Department confirming the obtaining of the warrants. The proper confirmation was received at approximately 7:00 p.m. of October 18, 1975.

On October 19, 1975 at 8:00 a.m. the police peaceably and without notice entered Rooms 307 and 308, placing the defendants under arrest as being fugitives from justice from the State of New York. The defendants were given Miranda warnings and removed to the Broward County Sheriff's Office where they each executed

Miranda warnings waivers and the defendant Graham gave a detailed taped confession concerning the murder.[1]

The confession revealed that the defendants had been planning the crime several weeks prior to the actual commission; that Graham knew that Mitton would be carrying a large amount of money, being familiar with the operation; that Mitton was abducted in front of the bank and, while alive, placed in the trunk of the Lincoln; that the station wagon was later abandoned on a deserted road. They then arrived at the Brookhaven Bungalow Colony where Graham struck Mitton over the head with a club and while alive, Lucas shot him three times and attempted to shoot more but the gun jammed. Thereafter, Lucas dragged the body off the pathway where he was left to die. The defendants then divided the money, disposed of the bank deposit bags in the woods, picked up the girls and left for New Jersey. The next day they rented safe deposit boxes and placed the cash proceeds of the murder therein and then proceeded to Florida.

Based upon the confession, the police had reason to believe that Craig Mitton was placed in the trunk of the defendant's Lincoln automobile while still alive, so they redusted the inside of the trunk lid on October 20, 1975, finding four fingerprints of the victim. They further obtained two search warrants for each of the banks in New Jersey and recovered the safe deposit boxes rented to each defendant with in excess of $10,000.00 in cash in each box, plus receipts for traveller's checks.

On October 21, 1975 the defendants waived extradition from the State of Florida and returned to New York to stand trial on the charges of murder, kidnapping and robbery of Craig Mitton.

---

[1] Due to the confession of the co-defendant, the trial of these defendants was severed and the details of this confession and its very existence were not divulged to the jury.

POINT I

THE TRIAL COURT PROPERLY ADMITTED ON REBUTTAL TESTIMONY THE EVIDENCE RELATING TO THE ADMISSIONS MADE BY THE APPELLANT.

On the airplane back to New York, the defendant was accompanied by Investigator Daniel Reidy. While on the flight, the defendant initiated a conversation with Reidy by asking whether he could discuss the case with the investigator. This conversation was testified to at the trial as follows:

"Q: What, if any, conversation took place after that?

A: Well, Mr. Lucas asked me what he could be charged with and I told him a list of charges which included kidnapping, robbery and murder and then he asked me what kind of sentence he could get for that and I believe I told him three life sentences if he was found guilty on all charges; and then he asked me what kind of guy the District Attorney was in Sullivan County and I told him I really didn't know him personally because I had not worked that much in Sullivan County. He asked me if I could set up a meeting between himself, Mr. Lucas, and the District Attorney because if he could talk to the District Attorney that he could show him that maybe he was there but he didn't do everything. That was basically what he told me."

Immediately thereafter, the Trial Court charged the jury as follows:

"The Court: Ladies and gentlemen, this evidence concerning a statement allegedly made by Mr. Lucas on the airplane, if you find some statement was made, is admitted into evidence, it is admitted into evidence for the purpose of showing an inconsistency between the defendant's testimony on this trial and what he said on another occasion to assist you in determining his believability or credibility. So, its admitted for the purpose of credibility and not for the purpose of truth or untruth of the statement itself."

Initially, the Trial Court at the conclusion of the suppression hearings found that the statement was voluntarily made and was admissible, and was not the product of any police interrogation. The Appellate Division, on appeal after the first trial, at 73 A.D. 2d 699, 700, also found the statement admissible and stated:

"The record supports the finding that the prosecution met its burden of proving that defendant's statement was voluntary and spontaneous and, therefore, admissible."

Subsequently, the Court of Appeals, at 5[illegible] N.Y. 2d 678, reversed the defendant's conviction upon the grounds that the statement made was not spontaneous and, therefore, admitted in violation of the defendant's New York right-to-counsel rule as enunciated in People v. Cunningham, 49 N.Y. 2d 203.

Based upon the above rulings, it is clear therefore that the statement made by the defendant-appellant Lucas to Investigator Reidy was in fact voluntary, as contemplated by the Fifth Amendment of the United States Constitution, as well as conformin to the rules of Miranda. Its suppression was the product solely of the New York rule concerning the attachment of the right to counsel.

At the second trial, the Court ordered that the defendant's statement to Investigator Reidy be suppressed and, therefore, it

was not testified to in the People's case in chief. Investigator Reidy was not permitted to testify to the statement made on the airplane until rebuttal testimony and after the petitioner Lucas testified concerning his version of the events. Immediately after Investigator Reidy's testimony, the Court gave a limited charge to the jury, instructing them that they cannot utlize the petitioner's admissions if they find they were made for the purpose of truthfulness, but only as it affects the issue of credibility.

The cases cited by the petitioner in his brief are inapposite to the legal issues presented here. The petitioner relies upon Portash v. New Jersey, 440 U.S. 450, but in that case the admissions came as a result of a grant of immunity and the Court there determined that it is in essence the same as coerced testimony.

In the instant case, it has clearly been established and accepted as findings of fact throughout all the courts that this petitioner's admissions were in fact voluntary and not the product of any physical coercion or because of any threat of criminal contempt. The Court of Appeals, in People v. Ricco, 56 N.Y. 2d 320 (1982) at page 323, stated:

> "We have heretofore held that prior inconsistent statements, those secured in disregard of constitutional safeguards, nevertheless may be admitted to impeach the credibility of a defendant who chooses to take the stand to testify in contradiction of the contents of the flawed statements (People v. Washington, 51 N.Y. 2d 214, 220; People v. Wise, 46 N.Y. 2d 321, 329; People v. Kulis, 18 N.Y. 2d 318 [denial of arrestee's request to see a lawyer]; see Harris v. New York, 401 U.S. 222; see U.S. Const., 5th, 6th, 14th Amdts; N.Y. Const., Art. 1, §6)."

The Court in Ricco, supra, acknowledged that the exclusionary rule precluded the People from offering Ricco's statements as evidence-in-chief because of a right to counsel violation. The Court went on to say at 326 that:

> "But this did not mean that the statement could not serve other evidentiary purposes. As indicated at the outset of this opinion, once the defendant elected to testify, the People could, and indeed here did, resort to it on cross examination in an effort to impeach his credibility. To paraphrase Oregon v. Hass (420 U.S. 714, 722), 'A shield provided by (failure to respect the right to counsel) is not to be perverted to a license to testify inconsistently, or even perjuriously, free form the risk of confrontation with prior inconsistent utterances."

The Court in Ricco recognized, as was done in this case, that the Trial Court should give a limiting instruction. (The error that occurred in the Ricco case did not involve the rebuttal testimony on the issue of credibility, but rather that the testimony was used to rebut the defendant's insanity defense and, therefore, could not be used against the defendant.)

It should also be noted that in this case when the petitioner Lucas testified, he denied making the alleged admissions that were testified to by Investigator Reidy. He did not deny having a conversation with him on the airplane, but his testimony differed with regard to the contents of that conversation. In People v. Washington, 51 N.Y. 2d 214 (1980), the Trial Court there suppressed a prior inconsistent statement because a defendant had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436, and in fact, the Trial Court made a specific finding that the statements attributed to the defendant were not made. On rebuttal, the People called the

arresting officer who testified concerning the statements allegedly made by the defendant. The Court there held that the prosecutor may, in fact, use the statements on cross-examination or on rebuttal, as was done here. The fact that the defendant denied making the statements or that the Trial Court had deemed them inadmissible, does not preclude their use because the Court noted that whether the defendant made the statements is a factual issue to be resolved by the jury.

The prosecution in the instant case properly called Investigator Reidy to testify on rebuttal concerning the statements made by the petitioner Lucas on the airplane. The Court immediately thereafter gave a proper limiting charge leaving the factual issues to be determined by the trial jury. No error was committed with respect to the admissions of this evidence.

The petitioner's reliance on United States v. Brown, 699 F. 2d 585 (1973) a decision from the Second Cirucit Court of Appeals, is misplaced and does not create any difference of opinion between the New York Court of Appeals and the Federal Courts which need be addressed here. In Brown, the admission that was utilized for impeachment purposes was a post-indictment statement taken from the defendant in violation of his right to counsel. The Court limited its holding to the use of a statement taken from an indicted defendant in violation of the Sixth Amendment right and does not extend its decision to statements taken under other circumstances to include pre-indictment situations (see Brown, supra, at 590).

Since the statement involved herein, which was used for impeachment was pre-indictment, it is not within the ambit of

of the cases cited by the petitioner, nor was it the Trial Court's holdings in conflict with the holding of the United States Second Circuit Court of Appeals in Brown, supra.

POINT II

THE SEIZURE OF THE PETITIONER'S AUTOMOBILE AND THE SUBSEQUENT SEARCH AND ADDITIONAL RE-EXAMINATION FOR FINGERPRINT EVIDENCE WAS CONSTITUTIONALLY PERMISSIBLE.

The New York State Police obtained a search warrant from Hon. Nicholas Scalera, a Superior Court Judge for Essex County, New Jersey, for the defendant's 1974 Lincoln Continental bearing New York Registration No. 900-OHQ. This search warrant was obtained on October 17, 1975, and executed on the vehicle that same day at its location at the Gateway Downtowner Motel, Newark, New Jersey, where the vehicle had initially been observed by the police at approximately 3:00 a.m. of that day and remained under constant surveillance.

Judge Scalera determined that probable cause existed for the issuance of the warrant after hearing sworn testimony by the investigating officers. The search warrant issued for the automobile authorized the search for a .25 caliber pistol, fingerprints, blood stains and other evidence in connection with the homicide. After the search, a return of search warrant was provided to the Court. The validity of the warrant has already been upheld in the companion case of People v. Graham, 69 A.D. 2d 544, 548-549 (1979).

(A) THE ENTIRE LINCOLN CONTINENTAL WAS SEIZED PURSUANT TO THE SEARCH WARRANT

The search warrant that was signed by Judge Scalera authorized a search for ".25 cal, automatic pistol, fingerprints and palmprints, blood stains and other evidence of a

homicide used in connection with the crime of "Murder...." The evidence sought by this warrant was in conformity with C.P.L. §690.10 which lists the type of property that is subject to seizure and specifically, subdivisions 3 and 4, which state as follows:

> "3. Has been used or is possessed for the purpose of being sued, to commit or conceal the commission of an offense; or
>
> 4. Constitutes evidence or tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense."

The police knew at the time the search warrant was obtained that this particular Lincoln automobile was at the bank at the same time, date and place that the victim was to be there to make his night deposit. The police also knew that the night deposit was not made; that the vehicle the victim was using was abandoned and that the location where his body was found was quite a distance away from where his car was found. Coupled with the other factors constituting probable cause, the police could reasonably infer that the Lincoln Continental was used in some manner for transportation with respect to this murder. Further, the coroner knew that Craig Mitton had been struck on the head and the wound was inflicted while alive due to the extensive bleeding that emanated from it. Knowing this information, the police sought blood-stained evidence.

Based upon the foregoing, the Lincoln Continental clearly became the type of personal property subject to seizure under the search warrant as being "other evidence of a homicide used in connection with the crime of murder".

The petitioner now contends that the Lincoln Continental automobile was not seized at the time the search warrant was initially executed on October 17, 1985. This position is totally contrary to the issuing magistrate's order, the testimony that was adduced at the Suppression Hearing andthe Trial Court's findings.

Further, the police testimony was that after the execution of the search warrant, the Lincoln automobile remained under police surveillance and custody from that point until its removal on October 21, 1975. Lastly, the prosecution has always maintained that the vehicle was searched and seized on October 17, 1974. At the trial, Investigator Graham testified that the police maintained surveillance over the vehicle after the search warrant was executed.

Once the search warrante was executed the car and its contents became evidence in this criminal case and was being retained by the police authorities. At no time was the custody of this vehicle relinquished from the time of the execution of the search warrant and on October 21, 1975 the vehicle and its remaining contents were removed to the New York State Police Barracks located in Middletown, New York, pursuant to Court Order.

Investigator Kenneth Graham kept the keys to the Lincoln automobile at the time the search warrant was executed. The keeping of the keys is indicative of possession, custody and control and this position was maintained throughout the proceedings in this case.

An examination of the search warrant, the search warrant return and the order of Judge Scalera allowing the removal of

property from New Jersey to New York clearly demonstrates that the 1974 Lincoln Continental was properly seized by the law enforcement authorities. This search and seizure occurred on October 17, 1975 at approximately 8:00 p.m. and from that moment on, the vehicle came into the custody and full control of the New York State Police officers and that includes its contents as well.

(B) THE SEUZURE OF THE AUTOMOBILE PERMITTED SUBSEQUENT POLICE EXAMINATION FOR FURTHER EVIDENCE

The petitioner argues that the police conducted an unauthorized search pursuant to a warrant that permitted an overbroad examination of the vehicle and that the police could not re-examine the vehicle for fingerprints on October 20, 1975 after the initial search warrant execution. This position is not supported by the evidence or the law.

The search warrant specifically provided for uncertain enumerated items to include fingerprints and palm prints and "other evidence of a homicide used in connection with the crime of murder." Pursuant to the search warrant, the police seized various items of evidence within the scope thereof and as outlined in the warrant return. Based upon the homicide investigation, the items seized could reasonably have been believed to be involved both evidentiary and for identification purposes in their crime as they included the identified rope, identification of the defents, a shotgun and various rounds of ammunition. Further, the vehicle was dusted for latent fingerprints on its initial seizure of October 17, 1980.

With respect to the dusting of the inside of the trunk lid on October 20, 1975, by Investigator Graham for the purpose of seeking further fingerprint identification, the conduct of the New York State Police at that time was absolutely justified and was not a second entry or seizure with respect to the search warrant.

The police had the Lincoln automobile under surveillance from the moment it was discovered and under their custody and control once the search warrant was executed. As part of the probable cause for the warrant and the reasonable inferences drawn from the facts, the vehicle was used in some manner for the commission of these crimes. The car itself, became evidence along with its contents. The police presence was continuous at the vehicle and their investigation was on-going. The vehicle had already been seized pursuant to the warrant and the warrant permitted the searching for fingerprints and palm print evidence.

When the petitioner and his co-defendant were arrested on October 19, 1975, the defendant Graham's confession related that the deceased had been placed in the trunk of the vehicle while still alive. Based upon this confession, it was determined to have the fingerprint expert re-examine the inside portion of the trunk lid to determine if there was any fingerprint evidence corroborating the confession.

This was not a situation where there were multiple entries into an apartment or dwelling. It is simply a matter of the police reinspecting and examining evidence that has already been seized and within their control for purposes that are convenient

and suitable for their investigation. Whether these items of evidence are examined once, twice or numerous times does not in any way invalidate the already-lawful seizure.

The police conduct in leaving the car in place and maintaining surveillance after the initial search warrant execution was reasonable. The dusting or redusting for fingerprint evidence is a common police practice and again good procedure. The automobile was in fact a part of the "crime scene" and not only did the police have the right but, in fact, had the duty to examine it for additional evidence. This conduct was undertaken on the basis of ample factual justification pursuant to a legitimate and restrained investigation and upon probable cause.

Additionally, this court has considered the same issue raised by this petitioner in the Graham case on second remand from the United States Supreme Court (90 A.D. 2d 198). Concerning the second entry to search and the finding of the fingerprints of Craig Mitton, this Court stated:

> "[6] We next consider the legality of the search of the trunk lid of co-defendant Lucas' car from which the victim's fingerprints were taken on October 20, 1975. The vehicle had been seized, pursuant to a valid search warrant, three days earlier from a public motel parking garage near the Newark airport. An initial search was made which did not reveal the fingerprints...even if we were to hold that the police had exhausted their authority to serach under the warrant by the initial search of the vehicle, new probable cause for the second search was estabilised from the defendant's confession, and the second search may therefore be upheld under United States v. Ross, ___ U.S. ___, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)."

Once the police have lawfully seized a particular item, the ability to search that item and to analyze it should be determined by the scope of the investigation. It would be absolutely absurd to require, as petitioner suggests here, that the police should be required to obtain a new search warrant every time they sought further examinations of lawfully seized evidence.

Additionally, this contention has been rejected by this Court and the prior applications by the co-defendant Graham in the various writs filed. Furthermore, under the ruling in United States v. Ross, 456 U.S. 798 (1982) it is clear that the police had probable cause to believe that there was evidence concealed within the trunk of the Lucas vehicle based upon the Graham confession and would be able to search this vehicle even without a warrant had that been the case.

POINT III

THE PETITIONER'S ARGUMENT THAT THERE WAS DOUBLE JEOPARDY IN A RE-TRIAL ON TEH CRIME OF FELONY MURDER IS WITHOUT MERIT AND SHOULD NOT BE REVIEWED BY THIS COURT.

Based upon the Court of Appeals' opinion that reversed the first Lucas conviction at 53 N.Y. 2d 678, 681, the Court there made a specific finding that the defendant's contention that the entire Indictment should have been dismissed at the close of trial for lack of legally sufficient evidence was without merit. Based upon these specific findings of fact, there can be no question that there was not a determination going to factual innocence. The Appellate Division, Third Department's dismissal of the robbery and the kidnapping charges clearly did not constitute such a determination. Those charges were dismissed because they were included within the conviction for felony murder under the then-existing law in the State of New York. Subsequent to the original appeal the law has been changed in New York under the case of People v. Berzups, 49 N.Y. 2d 417 where the Court of Appeals has found that the underlying felonies are entirely separate from the felony murder.

Therefore, under the law of the State of New York even a finding of factual innocence for the crimes of kidnapping and/or robbery would not have precluded the subsequent trial for intentional murder and felony murder of this petitioner. The petitioner has failed to set forth any legal or factual basis which should cause this Court to entertain its jurisdiction with respect to this issue.

POINT IV

THE OTHER REMAINING CONTENTIONS BY THE PETITIONER DO NOT RAISE ANY LEGAL OR FACTUAL BASES WHICH SHOULD CAUSE THIS COURT TO ENTERTAIN ITS CERTIORARI JURISDICTION AND REVIEW THE CONVICTIONS OF PETITIONER FOR INTENTIONAL MURDER AND FELONY MURDER.

The petitioner raises several allegations in his petition which he claims would require review by this Court. Some of those allegations deal with the prosecutor's summation, factual determinations involving the suppression and/or introduction of evidence, failute to prove guilt beyond a reasonable doubt and the sentencing Court's determination to punish this petitioner based upon retribution for the aggravated nature of his crime.

There is nothing in the law that mandates either constitutionally or in the State of New York that a defendant receive an absolutely perfect trial. While there may be some things that occurr in a trial or are said in a trial that should not have occurred or have been said, it does not automatically raise it to a level that requires either reversal or certiorari review. All of the allegations made by the petitioner have been reviewed within the State Court system, not once, but twice. There is nothing that he raises now that is any different than what has already been determined by the Appellate Division and the New York STate Court of Appeals to have been fair, proper and which justifies the affirmance of the convictions for murder.

None of the cases cited by the petitioner demonstrate why this Court should entertain certiorari review upon the allegations raised.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied in all respects.

Dated: Monticello, New York
July 19, 1985

Respectfully submitted,

STEPHEN F. LUNGEN
Sullivan County District Attorney
Attorney for Respondent
Office and P. O. Address
County Courthouse
Monticello, New York 12701
(914) 794-3344

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

DISTRIBUTED AUG 6 1985

ORIGINAL

85-5116

RECEIVED
AUG 3 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1985

No. A-926

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

RICHARD P. LUCAS, PRO SE
78-A-2362
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

TABLE OF CONTENTS

Cases Cited i

Point I 1

It was error to admit on rebuttal the alleged admission of petitioner.

Point II (A)..... 5

Petitioner's automobile was not legally seized on October 17, 1975 and therefore, the subsequent warrantless search of the vehicle on October 20, 1975 was unconstitutional.

(B)..... 6

Point III 8

It was double jeopardy to retry petitioner for felony murder using the dismissed kidnapping as the underlying felony.

Point IV 9

Conclusion 9

Exhibit ("A") 10

POINT I

IT WAS ERROR TO ADMIT ON REBUTTAL THE ALLEGED ADMISSION OF PETITIONER

After petitioner testified at his second trial the trial Court allowed a police investigator to testify on rebuttal as to an inculpatory statement allegedly made by petitioner after his arrest. This alleged statement had previously been ordered supressed by the New York Court of Appeals because it had been obtained in violation of petitioner's right to counsel, and because it was involuntary.

This testimony by Inv. Reidy was extremely damaging to petitioner's case, as Reidy claimed that petitioner had told him that:

> " ... if he could talk to the District Attorney that he could show him that maybe he was there (at the scene of the crime) but he didn't do everything."

Reidy had testified on numerous other occasions regarding the alleged admission, and had never before claimed that petitioner had admitted to being at the scene of the crime.

Although the Court and the District Attorney both acknowledged that at no time during the prior six years had Reidy ever claimed that petitioner admitted to being at the scene of the crime (see page T-1255-56), Reidy refused to retract his perjurious testimony and the Court and the District Attorney allowed it to remain in the record. Further, the District Attorney argued that perjured testimony as fact in his opposition brief on appeal to the Appellate Division.

Respondent attempts to sway this Court by referring to the initial findings of the trial court and the Appellate Division regarding the legality of the alleged statement. Since the New York Court of Appeals reversed the findings of those courts regarding the statement, their findings are not germane to the present controversy and therefore, it is respectfully submitted that respondent's reference to same should be disregarded.

Contrary to respondent's claim, the Court of Appeals did not make a finding that the alleged admission was voluntary. In fact, the Court found exactly the opposite.

After finding that the alleged admission had been obtained in violation of petitioner's right to counsel, the Court went on to say:

> "Nevertheless, the courts below concluded that the uncounseled statement in question need not be suppressed, since, in their view, it was made 'voluntarily' and 'spontaneously' (citation omitted), this conclusion, however, is simply not supported by the record." (See Appendix C-3 of petitioner's brief in chief) (Emphasis supplied).

It is clear from the foregoing that the New York Court of Appeals made a finding that the alleged admission was obtained from petitioner involuntarily and therefore, pursuant to this Court's holding in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed. 2d 290, should not have been admitted for impeachment purposes at petitioner's trial.

Also, the same set of facts which prompted the Court of Appeals to find that petitioner's right to counsel had been violated under New York law, establishes a violation of petitioner's Sixth Amendment right to counsel.

Prior to the time that petitioner was alleged to have made the uncounseled statement, formal charges had been filed against him, and he had appeared before a magistrate for extradition proceedings at which time he requested the appointment of counsel and although not appointed, was allowed to speak with same.

Therefore, there is no question as to whether adversary judicial criminal proceedings had been initiated against petitioner, Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972); Moore v. Illinois, 434 U.S. 230, 98 S. Ct. 458, 54 L.Ed.2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L.Ed.2d 246 (1964), and as the Second Circuit stated in United States v. Brown, 699 F.2d 585 (1983):

> "When the government crosses the line from the investigatory to the accusatory stage, United States v. Lilla, 584 F. Supp. 1247, 1281(N.D.N.Y. 1982), the Sixth Amendment requires that the accused have the assistance of counsel or that the government meet the 'heavy burden of proving that any inculpatory statements thus obtained were voluntarily

> given after a valid waiver of the right to counsel'" United States v. Mohabir, 624 F.2d 1140 at 1147 (quoting from United States v. Lord, 565 F.2d 831, 839 (2d Cir. 1977).

Respondent attempts to distinguish this case from United States v. Brown, supra, because the Court in Brown limited its holding to post-indictment statements. However, an analysis of that decision reveals that the issue of whether the defendant was indicted or not was not the decisive factor in the Court's decision. The basis for the Court's decision was that the statement had been obtained in violation of the defendant's Sixth Amendment right to counsel.

Once a defendant's Constitutional right to counsel attaches, a violation of that right is just as unconstitutional whether it takes place before or after indictment, and so to is the trustworthiness of a statement obtained in violation of that right, just as suspect.

In any event, it appears that the New York courts have every intention of allowing into evidence for impeachment, statements obtained in violation of the Sixth Amendment right to counsel whether they are obtained before or after indictment. (See the New York Court of Appeals decision in People v. Maerling, 64 N.Y.2d 134, 485 N.Y.S.2d 23, in which they acknowledged the holding in Brown, supra, but stated that admissibility rests not on whether a constitutional right is implicated but on a determination of voluntariness), (see also People v. Monaghan, 118 Misc.2d 326, in which that Court also acknowleged the decision in Brown, supra, but stated that it was not bound by it.

Therefore, this case does present an opportunity for this Court to decide whether an inculpatory statement obtained in violation of the Sixth Amendment right to counsel can be admitted to impeach a testifying defendant, and to resolve the conflict that exists between the New York Court of Appeals decision in People v. Ricco, 56 N.Y.2d 320 and People v. Maerling, 64 N.Y.2d 134, the Second Circuit's decision in United States v. Brown, supra, and the Tenth Circuit's decision in United States v. McManaman, 606 F.2d 919.

This case also presents the opportunity for this Court to make clear to the State of New York and other jurisdictions, that involuntarily obtained statements may not be used against a defendant for any purpose.

POINT II

(A) PETITIONER'S AUTOMOBILE WAS NOT LEGALLY SEIZED ON OCTOBER 17, 1975 AND THEREFORE, THE SUBSEQUENT WARRANTLESS SEARCH OF THE VEHICLE ON OCTOBER 20, 1975 WAS UNCONSTITUTIONAL.

Respondent claims that part of the probable cause for the search and alleged seizure of petitioner's automobile on October 17, 1975, was that it had been seen at the bank at the same time that the victim was due to arrive there.

Although that statement was made to the magistrate who issued the search warrant, it was later proved to be false out of the mouth of one of the search warrant applicants.

Also, a prosecution witness placed petitioner and the automobile at the bank at 3:50 p.m. (T-79), and placed the victim still at his office at 4:15 - 4:30 p.m. (T-30). Respondent's own brief to the Appellate Division stated that the victim didn't leave his office to go to the bank until 4:30 p.m. (Respondent's Appellate Division brief page 19, para. G).

In any event, on October 17, 1975, the date on which respondent claims the automobile was seized, there was absolutely nothing to indicate that the automobile itself constituted evidence of a crime. Respondent has failed to state one factor which indicated to the police while searching the automobile (which is all the search warrant authorized them to do) that it was evidence of a crime, and which transformed it from an object to be searched, into an object to be seized.

Logic dictates that had the magistrate felt that the police had presented sufficient probable cause to indicate the automobile itself was evidence in the crime, he would have specifically authorized them to seize it rather than merely enter into it and search for other evidence. Since there was insufficient probable cause to indicate the automobile was evidence at the inception of the search, and the respondent has failed to articulate any factors on which the police later on October 17, 1975 relied upon to conclude that the automobile was evidence, it is clear that petitioner's automobile was not legally seized on that date.

It should be noted that respondent's claim on page # 9 of his opposition brief is misleading in that it implies Inv. Graham kept the keys to petitioner's vehicle from the inception of the search on October 17, 1975 and beyond. This is totally untrue, as Inv. Graham testified at petitioner's first trial that after the search of the automobile was completed on October 17, 1975, it was relocked and the keys were returned to the hook in the office of the parking attendant of the garage. (See attached Exhibit "A"). The fact that the police returned the keys to the parking attendant indicates that they did not seize the automobile on October 17, 1975, and did not feel that they had a legal basis for doing so.

No police officer ever testified that they had seized the automobile on October 17, 1975, and it appears that the purported seizure on that date is and always has been, a post hoc fiction created by the respondent in an attempt to sanctify the second warrantless, unconstitutional search of the automobile on October 20, 1975.

(B) THE SECOND WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE WAS NOT LEGALLY PERMISSABLE UNDER UNITED STATES V. ROSS, 456 U.S. 798.

Since it is clear that petitioner's automobile was not legally or factually seized on October 17, 1975, it was unconstitutional for the police to re-enter and search the vehicle on October 20, 1975 without obtaining a second search warrant. United States v. Ross, 456 U.S. 798, does not authorize warrantless searches of automobiles that are legally parked, and where no exigent circumstances exist.

The respondent's reference in his statement of facts to the confession of the codefendant Graham, has no probative value since it is not a question of whether the police possessed sufficient probable cause for a second search of the automobile, but whether it was incumbent upon them to present that probable cause to a magistrate for him to decide whether a second search of the vehicle was justified.

It should be noted that this is not the first time that respondent has attempted to prejudice a Court against petitioner by resorting to the use of the codefendant's confession. On appeal to both the

Appellate Division and the New York Court of Appeals, respondent included the codefendant's confession as part of his appendix and petitioner's attorney had to make motions, which were granted, to have it stricken from the record.

Since respondent was prevented from using the codefendat's confession against the petitioner directly (see footnote at page xi of respondent's opposition brief), he has seized every imaginable opportunity to suggest to the various courts that the petitioner should be judged by what the codefendant stated in his confession. This is despite the fact that the codefendant's statement was self-serving, false, and riddled with inconsistencies.

Respondent claims that the long list of items seized in the search of petitioner's automobile (see appendix K of petitioner's main brief) fell within the scope of "other evidence of a homicide used in connection with the crime of murder" that the search warrant authorized the police to seize.

What possible evidentiary or identification purposes could have been imagined by the police for seizing the "Tom and Betty" coloring book or the rasin, or hundreds of the other items that were seized?

If the statement "other evidence of a homicide used in connection with the crime of murder" allows the police to seize such a wide ranging and extensive list of items, with no apparent evidentiary value, that is exactly why the inclusion of that language in a search warrant is unconstitutional, makes it a general warrant, and should not be allowed.

On page 12 and 13 of his opposition brief, respondent claims that this Court has previously addressed the merits of petitioner's claims regarding the illegality of the search of his automobile, when it decided the petitions of the codefendant, Graham. This is totally false. The language quoted by respondent is from the Appellate Division of New York Supreme Court, Third Judicial Department, not from this Court, and is exactly the holding that petitioner is challenging herein.

POINT III

IT WAS DOUBLE JEOPARDY TO RETRY PETITIONER FOR FELONY MURDER USING THE DISMISSED KIDNAPPING AS THE UNDERLYING FELONY

The Appellate Division's finding that there never was a kidnapping was the equivalent of a finding that petitioner was factually innocent of the crime, and since the law at that time (which is the law in this case) held that the underlying felony of a felony murder was a lesser included offense of the felony murder, it subjected petitioner to be twice placed in jeopardy to be retried for a crime he was found not to have committed.

The fact that subsequent to petitioner's appeal the law in the State of New York was changed to make the underlying felony of a felony murder a separate crime from the felony murder, is irrelevant and is ex post facto in regard to petitioner.

POINT IV

THE REMAINING POINTS RAISED BY PETITIONER IN HIS PETITION HAVE MERIT AND WARRANT REVIEW BY THIS COURT

While it is true that the Constitution does not guarantee a defendant a perfect trial, the errors committed at petitioner's trial were of a magnitude which elevated them to a Constitutional level and denied petitioner a fair trial and due process of law.

The fact that the issues raised by petitioner have been reviewed by the Appellate Division and the New York Court of Appeals does not mean they have no merit; it merely reflects an error of judgment by those Courts, and that is the reason petitioner respectfully requests this Court to intervene to protect his rights and the rights of other defendants similarly situated.

CONCLUSION

It is respectfully urged that Petitioner's application for a writ of certiorari should be granted.

RICHARD P. LUCAS, PRO SE
78-A-2362
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

papers. Inside the vehicle itself were many personal papers belonging to a Mr. Lucas, some children's books on the back floor of the vehicle with the name of Deborah Kilb on it. Over the sun visor was a business card from the Holiday Inn at Ramsey, New Jersey, and airline tickets made out to a R. Graham for a flight to Florida, a rope, rounds of ammunition.

Q Where was the rounds of ammunition found, if you recall?

A One expended round in the back right floor of the vehicle and in the trunk of the vehicle was several other rounds of shotgun ammunition and .30-.30 caliber ammunition.

Q With respect to the evidence you just described what, if anything, did you do with it?

A I tagged the evidence at the time and took it into my custody, secured the items.

Q What, if anything, did you do with the car after you concluded with your examination pursuant to the search warrant?

A Right. The vehicle was cleaned off on the outside from the fingerprint powder I put on it and relocked and the key returned to the hook in the office of the parking attendant of the garage, and then the surveillance was

A235

EXHIBIT ("A")

AFFIDAVIT OF SERVICE BY MAIL

RECEIVED
AUG 3 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF NEW YORK)
: SS.:
COUNTY OF DUTCHESS)

I, RICHARD P. LUCAS, being first duly sworn, deposes and says:

That on the below indicated date of notarization, I served a true and exact copy of the attached Reply and Supplemental Brief in Support of Petition for a Writ of Certiorari upon:

Honorable Stephen F. Lungen
Sullivan County District Attorney
Sullivan County Courthouse
Monticello, New York 12701

and

Honorable Robert Abrams
Attorney General of the State of New York
Department of Law
State Capitol
Albany, New York 12224

by placing and sealing copies of same in pre-addressed, postage-paid envelopes, and by depositing same in a United States Mail Box located within the Green Haven Correctional Facility, Drawer B, Stormville, New York 12582

Respectfully submitted,

Richard P. Lucas

Richard P. Lucas, pro se
78-A-2362
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

Subscribed and sworn to before me this 29 day of July 1985.

NOTARY PUBLIC

MICHAEL A. KELLY
Notary Public, State of New York
No. 4798847
Qualified in Ulster County
Commission Expires March 30, 19 87

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SL. I4 PAGE 53

ORIGINAL

In The

Supreme Court of the United States

October Term, 1985

No. 85-5116

20

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

FURTHER SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

RICHARD P. LUCAS, PRO SE
78-A-2362
Green Haven Correctional Facility
Drawer B
Stormville, New York 12562

19

3 pp

THE SEARCH OF PETITIONER'S VEHICLE IS DISTINGUISHABLE FROM THE SEARCH OF THE VEHICLE IN CARNEY V. CALIFORNIA, ___ U.S. ___ 105 S. Ct. 2066.

Due to his limited knowledge of the law and the fact that he is proceeding pro se herein, it has just now come to petitioner's attention that this Court has recently decided the case of Carney v. California, ___U.S.___, 105 S. Ct. 2066, and that it behooves him to point out certain factors that distinguish the search of his vehicle from the search of the vehicle in Carney.

First, unlike the vehicle in Carney, supra, petitioner's vehicle was found stationary in a place regularly used for residential purposes. Petitioner's vehicle was stored in a internal garage located within the building proper of the hotel. Vehicles parked within the garage were not exposed to public view or scrutiny, nor were they subject to normal government regulation and inspection.

Secondly, unlike the vehicle in Carney, supra, petitioner's vehicle was not readily mobile, as it was under intense and constant surveillance by a phalanx of New York State Police Investigators, whose express purpose in being there was to intercept anyone who might approach and attempt to move the vehicle.

Also, since petitioner and the co-defendant were in custody 1000 miles away from the vehicle, and their two female companions were in constructive custody also 1000 miles away on the date of the second search of the vehicle, October 20, 1975, it is obvious that there was no danger that they would be returning to move the vehicle beyond the reach of the police.

Proof that the police were not concerned about the possibility of the vehicle being removed beyond their grasp, is the leisurely pace they set for themselves by not making the second search of the vehicle until the day after they gained what they claim was the additional probable cause (the co-defendant's confession) to make said search. Nothing whatsoever prevented the police from obtaining a second search warrant during that more than 24 hour period; nothing, that is, other than their obvious belief that they could violate the law with impunity.

In sum, petitioner's vehicle was not readily mobile, and was not in a setting that objectively indicated that the vehicle was being used for transportation. The police knew the vehicle wasn't going anywhere, and there were no other exigent circumstances that required an immediate, warrantless search.

Therefore, this Court should distinguish the search of petitioner's vehicle from the search of the vehicle in Carney, supra, and should hold the search of petitioner's vehicle on October 20, 1975, to be an unconstitutional, warrantless search.

CONCLUSION

For the reasons stated herein, and in the Reply and Supplemental Brief and Petition previously submitted, it is respectfully urged that the petition for a writ of certiorari should be granted.

RICHARD P. LUCAS, PRO SE
78-A-2362
Green Haven Correctional Facility
Drawer B
Stormville, New York 12582

(3)

SUPREME COURT OF THE UNITED STATES

LAWRENCE FEIN *v.* PERMANENTE MEDICAL GROUP

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 85–19. Decided October 15, 1985

The appeal is dismissed for want of a substantial federal question.

JUSTICE WHITE, dissenting.

Cal. Civ. Code Ann. § 3333.2 (West) establishes a $250,000 maximum limitation in medical malpractice actions for "noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary damage." This statute is part of the Medical Injury Compensation Act of 1975, enacted by the California legislature in response to the dramatic rise in consumer medical costs caused by the increase in both monetary awards in medical malpractice actions and medical malpractice insurance premiums. See 1975 Cal. Stats 2d Ex. Sess. ch. 2, § 12.5(1)(b).

Appellant brought a medical malpractice action against appellee, Permanente Medical Group, a partnership of physicians, for failing to diagnose and prevent a myocardial infarction. The jury awarded appellant total damages of $1,287,783, including $500,000 for noneconomic losses. The trial judge, however, pursuant to § 3333.2, reduced the amount of noneconomic damages to $250,000.

The California Supreme Court affirmed, rejecting appellant's challenge that § 3333.2 contravenes both the Due Process and Equal Protection clauses of the federal Constitution. The court found no Due Process violation based on the theory that "the Legislature retains broad control over *the measure* as well as *the timing* of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legis-

4pp

lature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest." *Fein* v. *Permanente Medical Group*, 38 Cal. 3d 137, 158, 695 P. 2d 665, 680 (1985) (emphasis in original). The court then reasoned that the limitation imposed by § 3333.2 was a rational response to the problem of rising medical malpractice insurance costs.

Similarly, the court found that § 3333.2 did not improperly discriminate either between medical malpractice plaintiffs and other tort plaintiffs, or within the class of medical malpractice plaintiffs by denying full recovery to those with noneconomic damages exceeding $250,000. The Legislature's decision to limit the application of § 3333.2 to medical malpractice cases, and within those cases to those with large noneconomic damage awards, the court reasoned, was a rational response to escalating malpractice insurance rates.

California thus joins Indiana as the only two states to uphold the constitutionality of this type of medical malpractice damage limits. See *Johnson* v. *St. Vincent Hospital, Inc.*, 404 N. E. 2d 585, 598–601 (Ind. 1980). Four other states which have addressed similar damage limitations have invalidated the challenged provisions on federal constitutional grounds. *Baptist Hospital of Southeast Texas* v. *Baber*, 672 S. W. 2d 296, 298 (Tex. App. 1984) ($500,000 limit on damages other than medical expenses); *Carson* v. *Maurer*, 120 N. H. 925, 941–943, 424 A. 2d 825, 836–838 (1980) ($250,000 limit on "noneconomic" damages); *Arneson* v. *Olsen*, 270 N. W. 2d 125, 135–136 (ND 1978) ($300,000 limit on total damages); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Ops. 3d 164, 166, 355 N. E. 2d 903, 906–907 (Com. Pl. 1976) ($200,000 limit on "general" damages).*

---

*In addition, at least one other court has struck down a similar medical malpractice damage cap as violative of its state constitution. *Wright* v. *Central DuPage Hospital Association*, 63 Ill. 2d 313, 329–330, 347 N. E. 2d 736, 743 (1976). Cf. *Jones* v. *State Board of Medicine*, 97 Idaho 859, 877, 555 P. 2d 399 (1976) (remanding for factual determination on whether

One of the reasons for the division among the state courts is a question left unresolved by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59 (1978). In that case, the Court upheld the provisions of the Price-Anderson Act 42 U. S. C. § 2210 (1983 ed.) which place a dollar limit on total liability that would be incurred by a defendant in the event of a nuclear accident. One of the objections raised against the liability limitation provision was that it violated Due Process by failing to provide those injured by a nuclear accident with an adequate quid pro quo for the common law right of recovery which the Act displaced. The Court noted that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here. . . ." *Id.*, at 88 (footnote omitted).

The North Dakota Supreme Court in *Arneson*, *supra*, followed *Duke Power Co.*, and refused to hold that the legislature may not limit a pre-existing right without providing a quid pro quo. 270 N. W. 2d, at 134–135. Nevertheless, the court went on to find that the imposition of a damage cap on malpractice claims did not provide a sufficient quid pro quo for the severely injured malpractice plaintiff, as his loss of recovery was offset only by lower medical costs for all recipients of medical care, and he received no specific benefit in return. *Id.*, at 136, citing *Wright* v. *Central DuPage Hospital Association.*, 63 Ill. 2d 313, 328, 347 N. E. 2d 736, 743 (1976). This approach has been followed by the courts in Texas and New Hampshire. See *Baptist Hospital of Southeast Texas*, *supra*, 672 S. W. 2d, at 298; *Carson*, *supra*, 120 N. H., at 941–943, 424 A. 2d, at 837–838. In the instant case, however, the California Supreme Court concluded that "it would be difficult to say that the preservation of a viable

---

a medical malpractice "crisis" actually existed in Idaho to justify adoption of damage limitation).

medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." 38 Cal. 3d, at 160, n. 18, 695 P. 2d, at 681–682, n. 18.

Whether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more states will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.